85-1001

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
1985 Term

Wayne Louis Bohn and Sharon Anne Bohn, individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a minor and Wayne Arthur Bohn,

Plaintiffs-Petitioners,

vs.

County of Dakota; Shirley L. Utzinger, Director of Social Services, Dakota County Human Services Department; Beth Welshons, Worker, Child Protection Assessment Unit; Anthony A. Bibus, Supervisor, Child Protection Assessment Unit; Kenneth Malvey, Assistant County Attorney; Robert F. Carolan, County Attorney; Dakota County Human Services Board; John S. Voss, Chairman, Joseph A. Harris, Gerald E. Hollenkamp, Steven Loeding, and Russell L. Streefland,

Defendants-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the Supreme Court are as follows:

(1) Did the Eighth Circuit Court of Appeals err in determining that respondents' failure to provide petitioners with notice of a finding of child abuse, a statement of the basis for the finding of child abuse, notice of a right of appeal, and information on how an appeal could be pursued did not constitute a denial of petitioners' right to due process?

(2) Did the Eighth Circuit Court of Appeals err in determining that statutory/regulatory procedures provided under Minnesota law for appealing or disputing a finding of child abuse were adequate to satisfy the due process requirements of the

Fourteenth Amendment?

(3) Did the Eighth Circuit Court of Appeals err in not allowing this case to proceed through discovery before determining that the statutory/regulatory procedures provided under Minnesota law for appealing or disputing a finding of child abuse satisfied the due process requirements of the Fourteenth Amendment?

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Wayne Louis Bohn, et al. v. County of Dakota, et al., United States Court of Appeals for the Eighth Circuit, No. 84-5100, September 11, 1985.

GROUNDS FOR JURISDICTION

The judgment to be reviewed was issued by the Circuit Court of Appeals for the Eighth Circuit under date of September 11, 1985.

The statautory provision which confers jurisdiction upon this Court is 28 U.S.C. §2101.

STATEMENT OF THE CASE

Summary of Facts and Procedural History of Litigation

Petitioners Wayne Louis Bohn and Sharon Anne Bohn (hereinafter "Mr. and Mrs. Bohn") were licensed by the County of Dakota as foster parents. During the period December, 1979 to June, 1982, twenty foster children were placed in their home. Petitioners Bradley L. Bohn and Wayne Arthur Bohn (hereinafter "Brad Bohn" and "Wayne Bohn,Jr.", respectively, or, together with Mr. and Mrs. Bohn, "the Bohns", collectively) are Mr. and Mrs. Bohn's natural children, Wayne Bohn, Jr. having achieved majority age during the pendency of this proceeding and vacated Mr. and Mrs. Bohn's home.

On May 31, 1982 a scuffle occurred between Brad Bohn and his brother Wayne

Bohn in the back yard of the Bohn home. Mr. Bohn intervened to separate the two boys. Wayne Bohn became very upset and ran to a neighbor's house. After over two hours had elapsed and Wayne Bohn had not returned home, Mrs. Bohn called the City of Eagan Police Department and asked for assistance. A police officer went to the neighbor's home, but Wayne Bohn had left to take a walk. Later, another police officer went to the neighbor's home, and after unsuccesfully attempting to return Wayne Bohn to his home, took him to the police station. Wayne Bohn returned home later that evening when his father came to the police station for him.

Sometime the same day or after the police department filed a report with the Dakota County Department of Human Services. An "Assessment" social worker

with that department conducted an investigation. In the process she met with neighbors and associates of Mr. and Mrs. Bohn, teachers and friends of Wayne Bohn, and, without notice to Mr. or Mrs. Bohn, even removed Wayne Bohn from his classes at school to question him. She met once with Mr. and Mrs. Bohn, who came to her office on short notice. It was evident at the outset of this meeting that the assessment worker had already determined there had been physical abuse and she so advised the Bohns. The Bohns denied there had been any abuse and also expressed their opinion that the matter had been decided before the assessment worker had met with them.

On the basis ofthe assessment worker's investigation, the Department determined that there existed "substantiated evidence" of child abuse. The matter was

then referred to another unit of the Dakota County Department of Human Services, which unit assigned a Child Protection Worker to the Bohn family.

This Child Protection Worker met with Mr. and Mrs. Bohn several times, met privately with Wayne Bohn and Brad Bohn, and advised the family several times that Mr. Bohn had abused his son Wayne Bohn and that both were in need of treatment. During this period Mr. Bohn contacted the assessment worker's supervisor, stated that she was wrong and there had been no child abuse, and asked the supervisor to review the assessment worker's determination. The supervisor, Mr. Anthony Bibus, refused to change the assessment worker's determination and stated that if Mr. Bohn would cooperate and accept counseling there would be no adverse consequences. Mr. Bohn continued

to deny there had been child abuse and refused the suggested treatment. He asked how he could appeal the Department's determination and was told by Mr. Bibus there was no right of appeal.

On June 4, 1982, four days after the alleged physical abuse, Wayne Bohn was examined by a licensed physician, who found no evidence of physical abuse and wrote a report to that effect. A copy of this report was sent to the Assessment worker, but she refused to consider it since she had already made her determination. On June 14, 1982, Wayne Bohn wrote a letter to the Assessment worker denying that he had ever been abused by his father or that he had said anything to support such a finding. The Assessment worker received this letter, but disregarded it on the assumption that

Wayne Bohn had been forced to write it.

Dakota County never charged Mr. or Mrs. Bohn with neglect or dependency, nor did they initiate any action in Dakota County Juvenile Court, nor take any action to protect Wayne Bohn from the alleged danger from his father or remove him from his home, where he resided until he graduated from high school and joined the U.S. Marine Corps over two years later. After a few visits to the Bohn home by the Protection worker and continued denials by the Bohn family that there had been abuse of Wayne Bohn, and refusal to agree to take counseling (at the family's expense), the County dropped the case, except to continue to regard and treat Mr. Bohn as a child abuser.

The finding of child abuse resulted in the de facto revocation of Mr. and Mrs. Bohn's foster care license. All of the

foster children in the Bohn home at the time of the finding were immediately removed and none others have been placed there since. This was done without a hearing.

In February, 1984, over two and one-half years after the May 31, 1982 incident, and approximately six months after the Bohns filed a Section 1983 action, the County initiated a proceeding to revoke the Bohns' Family Foster Care License. Eventually a hearing was held in May, 1985. The Administrative Judge concluded that the Assessment Worker made a mistake and that there had been no child abuse. He recommended to the Minnesota Commissioner of Human Services that the Bohn Family Foster Care license not be revoked. Dakota county appealed that recommendation to the Commissioner of Human Services where the matter is

still pending. However, Mr. Bohn is still shown in Dakota County records as a child abuser and the Bohn foster care license, although not formally revoked, has been regarded by Dakota County as revoked. Since May 31, 1982, Dakota County has not placed any foster child in the Bohn home.

In addition, the Bohns lost the friendship and companionship of fellow foster parents since they were no longer invited to foster parent functions and since other foster parents, after learning of the child abuse finding, alienated themselves from the Bohns. Word of the alleged child abuse was communicated to the Bohns' neighbors and to Wayne and Brad Bohn's friends . Their reputation was put in disrepute.The Bohns found themselves literally ostrasized by the community. Both of the Bohn children

found the atmosphere at public school so changed that they were enrolled in and completed their high school educations in a private school. The parent-child relationship was severely strained for a long period by the child abuse allegations. And, of course, the family experienced feelings of embarrassment and humiliation as a result of the finding of child abuse and as a consequence suffered much mental distress.

It is interesting to note that long before initiating their Section 1983 action, Mr. and Mrs. Bohn asked the County to initiate a proceeding to revoke their foster care license to provide them a forum and an opportunity to disprove the child abuse finding. The County refused to do this. It was not until the Section 1983 action was initiated that the County, in what the Bohns

believe was retaliation, commenced formal revocation proceedings.

Mr. and Mrs. Bohn were never given any written notice of the finding of child abuse or a statement of the basis for that finding. Mr. and Mrs. Bohn were never advised of any right to have the finding of child abuse reviewed or to appeal the finding of child abuse or the means by which such a review or appeal could be obtained. On the contrary, they were advised by the Dakota County Department of Human Services and others that there was no right to appeal the finding of child abuse or to have it reviewed and no means or procedures were available for such a review or appeal.

Despite this advice, Mr. and Mrs. Bohn, acting on their own and through their attorney, made many attempts and took many actions to obtain a review or

appeal of the finding of child abuse or to disprove it and restore themselves to their former situation. These actions consisted of the following:

1. During the period June 4, 1982 to June 15, 1982, Mr. Bohn, independently, and through counsel, made several verbal and written denials of the finding of child abuse and requested an opportunity to demonstrate the inaccuracy of the finding. The reply of the Department of Human Services to each request was that the finding was final and not subject to review or appeal.

2. Following these denials, Mr. and Mrs. Bohn initiated an action in Dakota County Juvenile Court and participated in a hearing on July 9, 1982.

3. In a letter dated June 25, 1982, to the Judge of Dakota County Juvenile Court with a copy to the Assistant Dakota

County Attorney County, the Bohns advised of the damage being caused the family as a result of the child abuse finding and of the need for a method of resolving the matter. There was no reply.

4. At the Juvenile Court hearing on July 9, 1982, the Assistant Dakota County Attorney asserted that the correct procedure for the Bohns to pursue to challenge a finding of child abuse was an appeal under the "Fair Hearing Act". A few days after the hearing, the attorney for the Bohns telephoned a referee in the Appeals Division of the Minnesota Department of Public Welfare. This individual stated that he did not believe there was any way to appeal a finding of child abuse but suggested sending a letter requesting a hearing.

5. The Bohns'attorney wrote such a letter on July 15, 1982. By letter dated

July 26, 1982, that agency advised that it lacked jurisdiction to review the matter. There was no information on an appeal procedure. The Bohns notified the Judge of Juvenile Court and the Assistant Dakota County Attorney, by letter dated August 6, 1982, of the Department of Public Welfare's determination.

6. The Dakota County Juvenile Court advised by letter dated September 2, 1982, that it refused to accept the Petition submitted by the Bohns' attorney. The Dakota County Juvenile Court's decision was appealed to the Dakota County District Court, which without any hearing, affirmed the action of the Juvenile Court. The District Court, in its Order of Dismissal, stated "more appropriate procedures were available." By letter dated December 6, 1982, to the District Court Judge, a copy of which was

sent to the Dakota County Assistant County Attorney, the Bohns' attorney asked that the procedures referred to be identified. There was no reply.

7. In approximately October, 1982 the Bohns solicited the assistance of the Commissioner of Dakota County elected from their district who is also a member of the Dakota County Human Services Board. A meeting between Mr. and Mrs. Bohn and that Commissioner took place at the Bohn home. The Commissioner later wrote Mr. and Mrs. Bohn and advised them that he had met with a member of the Dakota County Attorney's office and could not pursue the matter because it was in litigation. Here again, although Mr. and Mrs. Bohn voiced their desire to appeal the finding of child abuse, they were provided no information concerning the procedure for initiating such an appeal

8. By letter dated December 15, 1982, the Bohns' attorney submitted a Petition to the Dakota County Human Services Board asking the Board to take action to give the Bohns a hearing on the child abuse allegations. The County Administrator advised by letter dated January 5,1983, that the Dakota County Attorney's office would not allow the Board to take any action. In a reply letter dated January 7, 1983, Mr. and Mrs. Bohn advised officials of Dakota County of the serious damage caused by family by the chld abuse finding.

9. The Bohns appealed the decision of the Dakota County District Court to the Supreme Court of the State of Minnesota. In a Memorandum of Law submitted in January, 1983, to state Supreme Court the attorney representing Dakota County referred to the Minnesota statutes

concerning the review of private data maintained by a department as providing the means of appealing a finding of child abuse. This was the first information provided by the County concerning a means of appeal. There was no mention of any administrative procedures or of the Minnesota Code of Agency Regulations (MCAR).

10. At a Pre-Hearing Conference in January, 1983, a Justice of the Minnesota Supreme Court in an informal conversation agreed that he did not know of a means by which a finding of child abuse could be appealed. He suggested the possibility of a Section 1983 action. The Bohns agreed to dismiss their appeal of the District Court decision.

11. Following the pre-hearing conference, the Bohns immediately attempted to pursue the procedures made known to them

by the County. In a letter dated January 20, 1983, to the Director of the Dakota County Human Services Department, Mr. and Mrs. Bohn took the first step by requesting that they be furnished copies of certain data.

12. By letter dated February 7, 1983, an Assistant County Attorney of the Dakota County Attorney's office advised that relevant files had been gathered and were available for review. On February 15, 1983, Mr. and Mrs. Bohn and their attorney traveled to the location of these documents in Hastings, Minnesota to review the documents. By letter dated February 24, 1983, Mr. and Mrs. Bohn advised the County of the documents they wished to have copies of and paid $53.05 for these copies.

13. By letter dated April 29, 1983 the Bohns identified four documents in the

files of the Dakota County Department of Human Services and asked that certain portions of those documents be changed to state and conclude that Mr. Bohn did not abuse his son Wayne Bohn. Approximately one month later, by letter dated May 27, 1983, the Director of Dakota County Human Services replied stating that the documents referred to were accurate and would not be changed. There is no mention in this May 27, 1983 letter of any right to appeal the determination not to change the Department's documents nor of the means by which an appeal could be pursued.

14. By letter dated January 7, 1983, a copy of which was furnished to the County Attorney of Dakota County and the Dakota County Commissioners, the Bohns sought the assistance of their state representative. He did not provide any.

15. By letter dated June 10, 1983, the Bohns made a final appeal to the Dakota County Human Services Board asking once again that they be given the opportunity to disprove the finding of child abuse. There was no reply.

Thus, Mr. and Mrs. Bohn and their attorney did everything within their knowledge and power to obtain a review of or appeal the finding of child abuse. The County and their attorneys, although very much aware of the Bohns' disagreement with the child abuse finding and their all-consuming desire to disprove the finding, provided no written or oral information on the procedures which have since been discovered and which they now contend Mr. and Mrs. Bohn could have utilized. It seems apparent that Dakota County's attorneys were similarly unaware of the procedures pertaining to an appeal

of a finding of child abuse until these procedures were accidentally discovered in February, 1984. The accidental discovery of the procedure resulted when counsel for the Bohns, in response to the County's contention that a child abuse finding could be appealed to the Minnesota Office of Administrative Hearings, wrote to that office to demonstrate that there existed no right of direct appeal. The reply of that office confirmed that there was no direct right from an agency finding of child abuse. That same reply, however, went on to disclose the administrative regulations concerning such an appeal. It was at this time that the Bohns and their attorney first learned of the procedures contained in the Minnesota Code of Agency Regulations (MCAR). Mr. and Mrs. Bohn and their attorney have contended and still contend that it was

not reasonably possible to learn of these procedures by any reasonable means, particularly since at the time there was no index to the MCAR, no cross reference tables, and there is no requirement that the subject of a finding of child abuse be advised of any appeal rights.

The process in Minnesota concerning the reporting and investigation of suspected child abuse and appealing a finding of child abuse which was finally discovered by Mr. and Mrs. Bohn, their attorney, and Dakota County in February, 1984, and with which Mr. and Mrs. Bohn take exception, is as follows (the statutes and regulations referred to are reproduced as part of the appendix hereto):

1. Minnesota Statutes §626.556 requires reports of suspected child abuse from certain persons, such as doctors, teachers, child care workers, etc., and

authorizes voluntary reports by all other individuals. An individual making a report of child abuse is immune from civil or criminal liability unless it can be shown that a false report was made "willfully or recklessly". Under the statute, the name of a person making a report of suspected child abuse cannot be disclosed except upon court order.

2. Under the statute, the local welfare agency is directed to immediately investigate a report of suspected child abuse and "offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible." (Subd. 10).

3. Such an investigation is conducted by interviewing the individual making the report and others who have had contact

with the child. These investigations normally are conducted without notice to the alleged child abuser or notice to the parents of the allegedly abused child. The alleged child abuser and the parents of the allegedly abused child are not told the names of the person or persons who reported child abuse and not necessarily told the details of the information reported.

4. When the investigation is completed, the social worker makes a determination that the report of child abuse has or has not been "substantiated". If it is determined that the report of child abuse has been substantiated, another social worker is immediately designated to provide services to the family. There is no written notice or report given the alleged child abuser or the family that there has been a finding of child abuse.

The alleged child abuser and the parents are not given any notice of any right to have a finding of child abuse reviewed or to appeal such a finding, and, in fact, they are normally told that the finding is final and there is no right of review or appeal.

5. Minnesota Statutes §626.556, makes no mention of any right to appeal a finding of child abuse or the procedure for initiating such an appeal. The only hint of such a right is in Subdivision 11 of that statute, entitled "Records" which states that a record of a report of child abuse is to be maintained as "private data." Subdivision 11 further provides that "the records shall be collected and maintained in accordance with the provisions of sections 15.1611 to 15.1699." However, §§15.1611 to 15.1699 have been renumbered and relocated in

their entirety and are now found at Chapter 13. Section 15.1699, the statute pertinent hereto, is found at §13.04.

6. Reading §13.04 still would not disclose the right to appeal a finding of child abuse. Rather, the investigator would learn that the subject of any private data record has the right to ask the "Responsible Authority" that such documents be disclosed to him. In order to obtain disclosure, the subject of the document must make written application and must describe the documents he wishes to see. The "Responsible Authority" may or may not agree to allow the investigator to review documents. If the "Responsible Authority" refuses, the subject of the data can petition the state district court for an order compelling the "Responsible Authority" to make the documents available for review. If the

"Responsible Authority" agrees to allow review of the records described, or is ordered by the district court to allow such a review, documents can be reviewed at the location where they are stored and copies of the documents can be purchased. The typical price is $.50 per page. With respect to documents reporting child abuse, the documents are first modified by deleting names and other information.

7. The alleged child abuser can contest the accuracy of the records. To do this, the individual writes the "Responsible Authority" describing his disagreement with the record and requesting that it be corrected. The "Responsible Authority" has 30 days in which to reply. If the "Responsible Authority" refuses to change the record, and hence the finding of child abuse, then "the determination of the responsible authority may be appealed

pursuant to the provisions of the Administrative Procedure Act relating to contested cases." The statute does not say what that procedure is or where it can be found.

8. A "procedure for contested case" is set forth in Minnesota Statutes §§14.57 through 14.61. However, the statutes provide that only an agency can initiate a contested case proceeding. There is another process set forth in Minnesota Statutes §14.63 through 14.70 for judicial review of a contested case decision. Unfortunately, neither of these statutes offers any guidance as to how a contested case procedure is initiated, that is, how an individual can get access to the process.

9. Not revealed in the statutes, or in any note or cross-reference, there are provisions in the MCAR specifying the

procedure by which an individual can appeal a determination of a "Responsible Authority" not to correct a private data records. Those provisions are set forth in 2 MCAR §1.215. Unfortunately, it has been virtually impossible to find material in the MCAR (recently redesignated "Minnesota Rules"). There was previously no index to this set of rules and there is no table of cross references by which an individual can find any provisions implementing a statute.

The process described above is by any measure complicated, cumbersome and time consuming. And, it must be remembered that all during this time, the agency has involved itself with the family by providing "protective services". The family must contend with the agency's assertion to their child, the child's teachers and others, that the child is

abused. Further, if the alleged child abuser pursued the procedure described above, and eventually obtained a hearing before a Hearing Examiner at the Minnesota Office of Administrative Hearings, as provided for in 2 MCAR §1.215, he would find that he has the burden of disproving the finding of child abuse. This is established by the Rule in 9 MCAR §2.217, subp. 5.

If the opportunity were given, it could be proven that in all the years since 1975 when the child abuse reporting statute, Minnesota Statutes §626.556, was enacted, there has yet to be a single proceeding at the Office of Administrative Hearings contesting a finding of child abuse under the procedures described above. It also could be shown that since 1975, there have been thousands of findings of child abuse. It is unbeliev-

able that in all of those cases there is not a single erroneous finding of child abuse, or that there were no instances when the alleged child abuser disagreed with the finding. What is evident is that the lack of notice of a right of appeal and information on the appeal process, together with a complicated and cumbersome process has led to unbridled power by human services departments, or comparable agencies, to find child abuse and intrude into a family's affairs to provide "protective services."

Mr. and Mrs. Bohn contend that simple fairness as well as public interest require that whenever there is a finding of child abuse, the alleged child abuser should be notified in writing of a right of appeal, advised on how that right of appeal may be exercised, and provided a quick, simple and inexpensive procedure

for exercising the right of appeal.

If no inquiry is made as to the practicalities of locating and implementing the above procedure, one might erroneously conclude, as the District Court and Court of Appeals did, that the procedure satisfies due process requirements. The procedure appears -- on paper -- to provide due process. However, in determining whether the procedure afforded under Minnesota law satisfies due process requirements in this case, one must consider and appreciate the environment under which the Bohns and their attorney were operating during the relevant time period. The procedure that eventually materialized had never been used and was a mystery to everyone involved -- including the attorneys for Dakota County. The Bohns and their attorney were continually advised that no proce-

dure for appealing the child abuse finding existed and, because the procedure was hidden in an unindexed code of regulations, their efforts to uncover a procedure failed to disprove this advice. When the procedure was eventually uncovered by accident, the County suddenly adopted the position and convinced the Court that the Bohns and their attorney should have known of the existence of the procedure. In addition, not only is the procedure difficult and, in fact, practically impossible, for the lay person to locate, it is cumbersome and expensive to implement.

In order to put the appeal procedure as described above and the County's attitude with respect to child abuse in the proper perspective, mention is made here of a copyrighted article which appeared in a November 1985 issue of the Minneapolis

Star and Tribune entitled, "Child Protection System Said Out of Control." In that article, the former director of the National Center on Child Abuse states, with respect to the phenomenal increase in reported child abuse cases, that such statistics are often used to obtain funding, titilate the public and aid in the passage of new child protection laws. However, as the article continues, 60 to 70 percent of reported cases are unfounded.

The Basis for Federal Jurisdiction

The basis for original federal jurisdiction in this matter, specifically, the United States District Court for the District of Minnesota is that the matter was brought under a federal statute, specifically 28 U.S.C. §1983, and the amount in controversy exceeds $10,000.

ARGUMENT

(1) The Eighth Circuit Court of Appeals erred in determining that respondents' failure to provide petitioners with notice of a finding of child abuse, a statement of the basis for the finding of child abuse, notice of a right of appeal, and information on how an appeal could be pursued did not constitute a denial of petitioners' right to due process?

The thrust of the Bohns' argument is that persons who have been the subject of an investigation and have been found to have abused their child should be provided notice of the available procedure for appealing the finding. Without such notice, alleged child abusers acting on information provided by Government officials and because of the obscurity of the procedures could reasonably assume that no procedure exists for appealing the finding. A simple notice, similar to that provided in the revocation of foster parent licenses, would succeed in

alleviating this misconception.

The Eighth Circuit Court of Appeals, in its September 11, 1985 opinion, determined that interests protected by due process requirements existed in this case. Specifically, the Court said: "The privacy and autonomy of familial relationships involved in a case like this are unarguably among the protectible interests which due process protects." In addition, the Court stated, "Bohn's reputation is a protectible interest." Thus, since it has already been answered in the affirmative, the question of whether a protectible interest exists in this case will not be addressed herein.

In Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), the Supreme Court discussed the criteria for determining when due process required giving notice

of an action and information on how the action may be disputed. The Court held that before a municipal utility could terminate utility services, a customer was entitled to notice of the proposed action, notice of the means for disputing the proposed termination of service, and the opportunity to present their objections and commented that:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 26 L.Ed.2d 287 (1970), the Supreme Court held that welfare benefits could not be terminated without a prior adequate hearing, and that adequate notice was required for due process.

The rights of notice and opportunity to

be heard as part of due process was discussed extensively in Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 729 (1975), where the Supreme Court held that due process requires, in connection with a suspension of ten days or less, that a student be given notice of the charges against him and, if he denies them, an opportunity to present his version.

The three-judge Federal District Court panel in Dublino v. New York State Department of Social Serv., 348 F.Supp. 290 (D.C.W.D.N.Y., 1972) reversed, 413 U.S. 405, ruled, inter alia, that even though procedures had been promulgated giving an individual a right to a hearing before termination of benefits, such a right was not enough if the individual was not given adequate notice.

A three-judge Federal District Court

panel held in Sims v. Juras, 313 F.Supp. 1212 (D.C.D.Ore., 1969) that due process was violated by regulations authorizing and requiring termination or suspension of public aid prior to a hearing. The Court declared that due process under the Fourteenth Amendment required the following in relation to welfare:

> "Written notice to the recipient that his grant is proposed to be terminated or suspended, . . .
>
> "Of the reason or reasons for the proposed action . . .
>
> "That he will be afforded upon request an opportunity for hearing . . .
>
> "Of the method by which he may obtain a hearing . . ."

In Ryan v. Shea, 394 F.Supp. 894 (D.C. Colo. 1974), disability benefits for certain persons were terminated on the basis of changed eligibility requirements. The court held that such termination of benefits was in violation of the

requisites of procedural due process in that the notice of termination was inadequate in not stating plaintiffs' rights to dispute the determination through an evidentiary hearing prior to termination.

In Atwater v. Roudebush, 452 F.Supp. 622, at 630 (D.C., N.D.Ill. E.D., 1976) the court stated:

> "At a minimum, the recipient (1) should be given access to information relied upon by the agency as the reasons for its decision, and to a summary of the evidence upon which the decision is based, (2) should be given an opportunity to submit additional evidence or arguments in written form challenging the agency action prior to a final decision, and thereafter (3) should be informed of his right to an administrative review. None of these safeguards were present in this case. Instead, Atwater only received an informal oral conference with an agency official who explained the consequences of a decision that had already been made."

In Bryant v. D'Elia, 77 App.Div.2d 590, 430 N.Y.S.2d 103 (1980), an arrange-

ment existed whereby the Department of Social Service made shelter allowance payments directly to the bank holding the mortgage on plaintiff's home. The Department terminated payments causing plaintiff's mortgage payments to fall substantially behind and resulting in the commencement of foreclosure proceedings by the bank. The County argued that the plaintiff should not be allowed to contest the discontinuance since her request for a fair hearing was not made within the time limits set by statute. The court ruled that plaintiff's testimony that she never recevied notice of the discontinuance with notice of her right to a fair hearing overcame evidence that notice was properly provided and decided against the county's argument.

In Turner v. Walsh, 435 F.Supp. 707 (W.D. Mo. 1977) the court agreed with

plaintiff's assertion that notice of termination of benefits was defective and failed to meet Fourteenth Amendments standards "because it fails adequately to inform recipients of their right to a hearing to contest the intended action and to obtain continued benefits pending that hearing or a determination following it." (435 F.Supp. at 711)

In Deary v. Guardian Loan Co. Inc., 434 F.Supp. 1178 (S.D.N.Y. 1982) the court held that New York post-judgment enforcement procedures violated the due process clause because judgment debtors were not given notice of and an opportunity to challenge restraint or execution. The defendants in that action contended that notice had been given the judgment debtors by forms sent to them. In an exhaustive discussion citing substantial authority the court found such form

notice insufficient declaring that "without appropriate notice, the provisions of post-enforcement remedies cannot satisfy constitutional requirements." (534 F.Supp. at 1188)

The County's position with respect to notice from the outset has been that there is no obligation to furnish notice of a right of appeal or information on the procedure for taking an appeal. However, as the foregoing authority demonstrates, notice of appeal procedures is required in similar situations when an individual may not be aware of a right of appeal and may not seek legal counsel. The Bohns submit that the rationale applied in the cases discussed hereinabove is equally applicable to their situation, and any situation in which an individual is accused of child abuse. The enormity of the possible repercussions of

such an accusation on the stability of one's family require that every precaution possible be taken to assure the continued stability of family units.

(2) The Eighth Circuit Court of Appeals erred in determining that statutory/regulatory procedures provided under Minnesota law for appealing or disputing a finding of child abuse were adequate to satisfy the due process requirements of the Fourteenth Amendment?

The procedures for disputing a finding of child abuse that the County contends are adequate are not simple, inexpensive, speedy or suitable. As shown in the foregoing Statement of the Case, several steps are required merely to learn the basis of the finding. To obtain that information a person must (1) identify records he desires to review; (2) wait until the agency has gathered the records and determined if they will be made available for review and modify

records to eliminate names and other information; (3) visit the location of the records if permitted to review them (or initiate a court action or obtain review if the Responsible Authority refuses review); (4) pay for copies which are then made and sent; (5) write to the Responsible Authority requesting correction of inaccuracies in the records; and (6) wait for the reply of the Responsible Authority. These steps (which were taken by the Bohns in this proceeding) can be expected to take at least ninety days. Even then the alleged child abuser is not entitled to know the names of the witnesses without instituting a separate court action with additional expense and delay. At this point there still has been no hearing. If the Responsible Authority refuses to change the records, the alleged child abuser can initiate an

appeal (if he has been advised of or discovers the process). This requires an appeal to the Administrator of the Department of Administration (who reportedly has delegated the responsibility to the Commissioner of Public Welfare), who in turn refers the matter back to the local agency, who then refers the matter to the Office of Administrative Hearings, which then schedules a hearing at some time in the future. Even at this point, the alleged child abuser does not know the names of his accusers and therefore cannot subpoena them or cross-examine them. To obtain this, he would have to initiate and pursue a separate court proceeding and a judge may or may not order the agency to release the names of the accusers.

All during this time, the agency proceeds on the basis that the finding of

child abuse has been substantiated. If the individual involved is a foster parent, foster children are removed and the foster parent license is constructively suspended. A Child Protection Worker is assigned and meets with the alleged child abuser and the allegedly abused child to provide protective services -- whether or not such services are wanted and regardless of the damage and disruption caused the family.

In Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), the Supreme Court struck down an Illinois procedure for determining allegations of discrimination as not adequate to satisfy due process, and declared that the Fourteenth Amendment requires an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the

nature of the case.

In Ciechon v. City of Chicago, 686 F.2d 511 (CA 7, 1982), the Seventh Circuit described in substance due process requirements as requiring a fair proceeding and procedural safeguards which require proper notice and an opportunity to be heard.

In Brennan v. Occupational Safety and Health Review Commission, 505 F.2d 869 (CA 10, 1974) it was said:

> "A statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process." (citations omitted)

In Hayes v. Cape Henlopen School District, 341 F.Supp. 823 (D.C.Del., 1972), the Court found that the administrative remedy available to the plaintiffs was not adequate and, therefore, that plaintiffs were not precluded from

maintaining their Section 1983 action. The Court evaluated the administrative remedy that defendants in that action said was available to plaintiffs and stated as follows:

> "In addition, to be adequate, the procedures must be sufficiently delineated either through statute, regulations or practice to permit the individual and his attorney to accurately assess their responsibilities and opportunities within the administrative process and the probable efficacy of that process. No evidence is available on the record to indicate that such definitive description of procedures either prior to Mrs. Hayes' request for a hearing or in response to that request. * * * In these circumstances, the Court is of the opinion that the available administrative procedures were not sufficiently enumerated to meet the standard of adequacy appropriate to evoke the exhaustion doctrine."

The Bohns believe it is evident that the procedures said to be available to challenge a finding of child abuse are not clear or readily available, do not provide simple, inexpensive, speedy or

suitable remedies, and, hence, do not meet the Fourteenth Amendment standard of due process.

(3) The Eighth Circuit Court of Appeals erred in not allowing this case to proceed through discovery before determining that the statutory/regulatory procedures provided under Minnesota law for appealing or disputing a finding of child abuse satisfy due process requirements of the Fourteenth Amendment?

Mr. and Mrs. Bohn submit that the District Court should have conducted an investigation to determine if the procedures that were allegedly available to them were in fact adequate. In support of this contention, Mr. and Mrs. Bohn cite Coleman v. Faulkner, 697 F.2d 1347, at 1349 (10th Cir. 1982), where a district court decision dismissing a section 1983 action for failure to state a claim upon which relief could be granted was reversed without oral argument. The Court stated as follows:

"While the Oklahoma statute appears on its face to provide due process, Mr. Coleman asserts that he has no way to avail himself of the remedy it provides. He alleges that he is indigent and cannot retain counsel, that the state will not provide him with counsel for such a proceeding, and that prison officials will not permit him to appear in court on his own behalf.

"The trial court did not consider Mr. Coleman's allegation that the remedy provided by the state is constitutionally insufficient for an indigent prisoner. If that allegation is true, Mr. Coleman has stated a cause of action under section 1983.

A similar decision was rendered in Cofone v. Manson, 409 F.Supp. 1033 (D.C.D.Conn., 1976), in which the Court considered an inmate's challenge of procedures adopted by the Department of Corrections for screening incoming mail. In determining that the appeal procedures of the Department of Corrections did not meet the due process standards of the Fourteenth Amendment, the court said:

> "Before the court below may relinquish its §1983 jurisdiction, it must, on the most narrow eading of the cases, be positively assured--it may not presume--that there are speedy, sufficient and readily available administrative remedies remaining open to pursue, an assurance certainly not attainable on this record."

It is the Bohns' position that the District Court and the Court of Appeals erred in determining that the procedure provided under Minnesota law for appealing a finding of child abuse affords due process, without first allowing the Bohns to engage in discovery and to develop further evidence in support of their contentions. The Bohns have contended that the procedure provided under Minnesota law is violative of due process because it is cumbersome, burdensome and fails to require notice of the basis for the finding or the appeal procedure available. The procedure itself has

never been used in the ten years since the existing child abuse reporting statute was enacted and, thus, has never been tested. How, therefore can the court make an arbitrary determination that the procedure affords due process? The very fact that the procedure has never before been employed reasonably leads to the conclusion its obscurity has prevented its disclosure and, therefore, that it is violative of due process requirements. Without more information as to its practical implementation and ability to provide due process it cannot be said with precision that it in fact does provide due process.

In appraising the sufficiency of a complaint the accepted rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief [Conley v. Gibson, 78 S.Ct. 99, 355 U.S. 41, 2 L.Ed.2d 80 (1957)]. More specific to the case at bar is the rule that "A complaint under 42 U.S.C. § 1983 charging denial of constitutional rights by a state agency may not be dismissed for lack of jurisdiction unless it appears that the claim is frivolous or wholly insubstantial "[Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); Oneida Indian Motion v. County of Oneida, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed.2d 939 (1946)]. For jurisdictional purposes the test is whether the complaint on its face is so plainly insubstantial as to be devoid of any merit and thus not presenting any issue worthy of adjudication. [

Guillini v. Blessing, 654 F.2d 189 (2nd Cir., 1981)]. The Bohns submit that this certainly was not true in the case at bar.

In Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2nd Cir., 1980), a Section 1983 suit for damages arising out of the plaintiff's discharge as director of neighborhood corporation, it was held as follows:

> "Thus, where an infringement of a constituitionally protected interest in 'liberty' is alleged, it is essential that a litigant be afforded a reasonable opportunity to prove facts which, taken together, state a claim. Summary dismissal of alleged Fourteenth Amendment violations based on deprivations of this interest, therefore, is appropriate only when prior case law leaves no doubt that the defendant must prevail as a matter of law. In the instant case, we hold that the district court granted summary judgment prematurely and denied plaintiff a meaningful opportunity to prove that his liberty interest has been unlawfully infringed."

Finally, Katris v. City of Waukegan,

498 F.Supp. 48 (N.D.Ill.E.D., 1980), is a case which closely parallels the case at bar. In that case, a Section 1983 action, the plaintiff asserted that his application for a liquor license was improperly refused by the City of Waukegan without a statement of the reasons therefore and without a hearing. Specifically, the plaintiff contended that the procedure in effect which provided for de novo review by the state commission of liquor license applications failed to satisfy due process requirements because it failed to provide for "(a) standards governing mayoral discretion in evaluating 'good character and reputation in the community'; (b) notice to an applicant of denial, revocation or renewal of a liquor license; (c) a statement of reasons why an applicant is denied a liquor license; (d) a right to a

hearing on denial of a license; and (e) a right to appeal a mayoral decision denying a license to another decision-making body." These are almost precisely the same procedural safeguards sought by the Bohns in the case at bar.

As in the case at bar, the defendants in Katris moved to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted. After concluding that the plaintiff's interest in the liquor license constituted a property interest recognized and protected by Section 1983, the Court denied defendants' motion to dismiss as follows:

> "Ordinarily, a rejected applicant for statutorily authorized governmental benefits is given notice and an opportunity to respond to evidence against him.
>
> * * *
>
> "One procedural protection which is particularly important when a governmental benefit is denied in the

first stage of an administrative procedure is the right to a statement of reasons why the application was rejected.

* * *

"However, the city was constitutionally required at least to mandate a procedure through which the plaintiff was furnished a statement of reason why his application was denied, and to advise him of his right to appeal. Basic procedural fairness is required at all levels of government.

* * *

"The conclusion that the state must provide fundamentally fair procedures at every 'administrative proceeding of a judicial nature.' Hornsby v. Allen, supra, also accords with the general rule that a plaintiff need not exhaust his state judicial or administrative remedies before filing a federal civil rights action. (citation omitted)

"For the reasons stated above defendant City of Waukegan's motion to dismiss was denied."

Certiorari Should be Granted

It is thus submitted by Mr. and Mrs. Bohn and the rest of their family, that the Court of Appeals erred in arbitrarily

determining that the procedure currently in effect in Minnesota for appealing a finding of child abuse satisfies the due process requirements of the Fourteenth Amendment. As has been demonstrated above, the procedure, due to its obscurity and difficulty in implementation, does not provide due process. Accordingly, the Bohn family respectfully requests that certiorari be granted to permit them the opportunity to more fully demonstrate this.

Dated: December 9, 1985

Respectfully submitted,

Dale C. Nathan

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No. ___

IN THE SUPREME COURT OF THE UNITED STATES
1985 Term

Wayne Louis Bohn and Sharon Anne Bohn, individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a minor and Wayne Arthur Bohn,

Plaintiffs-Petitioners,

vs.

County of Dakota; Shirley L. Utzinger, Director of Social Services, Dakota County Human Services Department; Beth Welshons, Worker, Child Protection Assessment Unit; Anthony A. Bibus, Supervisor, Child Protection Assessment Unit; Kenneth Malvey, Assistant County Attorney; Robert F. Carolan, County Attorney; Dakota County Human Services Board; John S. Voss, Chairman, Joseph A. Harris, Gerald E. Hollenkamp, Steven Loeding, and Russell L. Streefland, .

Defendants-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
)ss.
COUNTY OF DAKOTA)

Dale C. Nathan, being first duly sworn, upon oath, deposes and says that he offers this Affidavit of Service in accordance with Rule 28 of the Rules of the Supreme Court of the United States; that he is an attorney at law with offices a 3435 Washington Drive, Suite 200, Eagan, Minnesota; that on the 9th day of December, 1985, he served the attached Petition for Writ of Certiorari and Appendix on the the following person by placing a copy thereof in a package properly addressed as follows:

Douglas J. Muirhead
Meagher, Geer, Markham, Anderson,
Adamson, Flaskamp & Brennan
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

which address is the last address of said

Douglas J. Muirhead known to him, and the package with postage prepaid was deposited by him in the U.S. Mail at Eagan, Minnesota for delivery by the U.S. Post Office Department as directed by said package.

Dale C. Nathan

Dale C. Nathan

Subscribed and sworn to before me this 9th day of December, 1985.

Notary Public

LYNDA J. NELSON
NOTARY PUBLIC - MINNESOTA
DAKOTA COUNTY
My Commission Expires Sept. 22, 1987

85-1001

Supreme Court, U.S.
FILED
DEC 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

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APPENDIX -- PART I

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-5100

Wayne Louis Bohn and Sharon Anne Bohn, Individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a Minor, and Wayne Arthur Bohn,	*	
Appellants,	*	Appeal from the United
v.	*	States District Court
County of Dakota; Shirley L. Utzinger, Director of Social Services, Dakota County Human Services Department; Beth Welshons, Worker, Child Protection Assessment Unit; Anthony A. Bibus, Supervisor, Child Protection Assessment Unit; Kenneth E. Malvey, Assistant County Attorney; Robert F. Carolan, County Attorney; Dakota County Human Services Board; John S. Voss, Chairman, Joseph A.	*	for the District of Minnesota

Harris, Gerald E. *
Hollenkamp, Steven *
Loeding and Russell L. *
Streefland, *
*
Appellees. *

Submitted: May 15, 1985
Filed: September 11, 1985

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

HEANEY, Circuit Judge.

Wayne and Sharon Bohn appeal from the district court's dismissal of their suit against Dakota County under 42 U.S.C. §1983 for failure to state a claim. For reversal, the Bohns argue, first, that the County denied them due process by failing to provide them with notice of a finding of child abuse, statement of the basis for that finding, and notice of their right to appeal;[1] and, second, that

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1

deficient administrative procedures for contesting or appealing a finding of child abuse violate fourteenth amendment.[2] We affirm.

I. BACKGROUND

On May 31, 1982, Wayne Bohn forcibly interceded to break up a fight between his two sons, one of whom then ran to a neighbor's house as a result. The

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The statute implicated in this challenge of the finding of child abuse is Minn. Stat. Ann. §626.556. In brief, the statute requires that certain professionals report suspected instances of child abuse to responsible county authorities who investigate the report and, if warranted, offer "protective social services" and "maintain appropriate records." We discuss relevant portions of this statute in section II, below.

2 In addition to Minn. Stat. Ann. §626.556, the statutes implicated in the Bohns' challenge to the administrative procedures for reviewing this finding include Minn. Stat. Ann. §§13.04 and 14.57-14.70 as well as certain administrative rules. We discuss relevant portions of these provisions in section IV, below.

incident prompted an investigation by the Dakota County Department of Social Services, which concluded that there was "substantial evidence" of child abuse by the Bohns. Although the Bohns disputed this conclusion,[3] the Department assigned a child protection worker to the case, pursuant to statute, and the social worker met with the Bohns and their children repeatedly in an attempt to remedy the presumed problems stemming from the alleged child abuse.

The Bohns attempted to clear the record of these charges but their efforts were generally ineffective. Initially, they complained to the County Department of Social Services and explained that they wished to contribute their side of

---

[3] The allegedly abused Bohn boy was examined by a physician who found no evidence of abuse or injury.

the story to the decision-making process, but the Department refused and stated that the investigation was complete. Thereafter, through counsel, the Bohns sought to correct the record through a variety of means, including a juvenile court action to the Dakota County District Court and the Minnesota Supreme Court, and requests for action through the Dakota County Human Services Board, their county commissioner, and their state representative.

When these measures were unavailing, the Bohns filed this section 1983 action in federal court. After the complaint was amended and was before the district court on a motion to dismiss, appellants' counsel wrote to the Minnesota Office of Administrative Hearings to demonstrate that appellants had no right of direct appeal from the finding of child abuse.

That office responded by citing the rules of the Commissioner of Administration which implement the state's administrative procedure act and govern appeals of contested cases. After finding that the Bohns were provided with a procedure to challenge the finding of child abuse, and finding that it satisfied constitutional standards of due process, the district court determined that the Bohns had not stated a claim on which relief could be granted; accordingly, the district court dismissed the complaint. The Bohns appeal, arguing the due process defects we have mentioned above.

II. DUE PROCESS AND THE FINDING OF CHILD ABUSE

The procedural protections guaranteed in the fifth and fourteenth amendments to the Constitution are triggered by the existence of a protectible liberty

or property interest. Thus, the process that is due depends upon the nature of the interest at stake. In considering such questions, therefore, we engage in a two-step analysis by which we search for a protectible interest and, when one is apparent, examine the established procedures to determine whether they satisfy constitutional standards.

The privacy and autonomy of familial relationships involved in a case like this are unarguably among the protectible interests which due process protects. We can conceive of no more important relationship, no more basic bond in American society, than the tie between parent and child. In Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court stated that the interest of a widower "in the children he has sired and raised, undecidedly warrants deference

and, absent a powerful countervailing interest, protection." Id. at 651. The Court continued:

> The interest of a parent in the companionship, care custody and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." Kovacs v. Cooper, 336 US 77, 95, 93 L.Ed. 513, 527, 69 S.Ct. 448, 10 ALR2d 608 (1949) (Frankfurter, J., concurring).
>
> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential", Meyer v. Nebraska, 262 US 390, 339, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 ALR 1446 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 US 535, 541, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 US 528, 533, 97 L.Ed. 1221, 1226, 73 S.Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 US 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the

Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, 67 L.Ed. at 1045, the Equal Protection clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, 86 L.Ed at 1660, and the Ninth Amendment, Griswold v. Connecticut, 381 US 479, 496, 14 L.Ed 2d 510, 522, 85 S.Ct. 1678 (1965) (Goldberg, J., concurring).

Id.

In another case considering the protections due a foster family, the Supreme Court first considered the case of natural families, and concluded that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.' Moore v. East Cleveland, ante at 503, 52 L.Ed.2d 531." Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977).[4] Having identified the protectible

We also note that the Bohns have a protectible interest in their reputations at stake in this case. By identifying the Bohns as child abusers, investigating the quality of their family life, and maintaining data on them, the County Department exposed them to public opprobrium and may have damaged their standing the community.

In Wisconsin v. Constantineau, 400 U.S. 433 (1971), the Supreme Court held that "where the State attaches a 'badge of infamy' to the citizen, due process comes into play. * * * Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at 437. The Court subsequently interpreted Constantineau in Paul v. Davis, 424 U.S. 693, 708: "We think that [the language] * * * 'because of what the government is doing to him', referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law[.]" In Paul, the Court concluded that state law did not protect respondent from publication of the fact of his arrest for shoplifting.

In light of the protectible family interest we have set forth above,

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vever, we read Constantineau as
ntrolling in this case and we disting-
sh Paul. When the County Department
nd Bohn to be a child abuser, it drove
edge into this family and threatened
very foundation. The stigma Mr. Bohn
'fers as a reported child abuser
loubtedly has eroded the family's
idarity internally and impaired the
ily's ability to function in the
munity. In light of these clear
erse effects on familial integrity and
bility, we find that Mr. Bohn's
utation is a protectible interest.
ause this stigma strikes so directly
the vitality of the family, we find
reputation interest at stake to be
arly distinguishable from the respon-
t's record of petty crimes in Paul,
ch was tied to no other protectible
erest.

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interests at stake, we next turn to the procedural protections that are due under Minn. Stat. Ann. §626.556. To assist the courts in evaluating the propriety of such procedures, the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), identified three factors:

> First, the private interest that will be affected by the initial action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirement would entail.

Id. at 335.

Our review of the competing interests harmonized in Minn. Stat. Ann. §626.556, the procedural protections embodied in the statute, and the method for administrative reconsideration of the finding leads us to conclude that the Bohns

received adequate procedural protection.

The statute of which the Bohns complain, Minn. Stat. Ann. §626.556, (entitled "Reporting of Maltreatment of Minors"), includes a declared public policy "to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse; to strengthen the family and make the home safe for children through improvement of parental and guardian capacity for responsible child care; and to provide a safe temporary or permanent home environment for physically or sexually abused children." Minn. Stat. Ann. §626.556, subd.

1. The statute requires that certain specified professionals must report instances of suspected child abuse to local authorities, and that any other

person having such knowledge may voluntarily make such a report. Id. at subd. 3. Local welfare officials are then obligated to "immediately investigate and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible," as well as to maintain "appropriate records." Id. at subd. 10.

The records are maintained in accordance with Minn. Stat. Ann. Chapter 13 on Government Data Practices. The records maintained are private except insofar as they are disclosed to investigating, petitioning or prosecuting authorities. The subject of these records has access to these records, except that the reporter's name is disclosed only upon court order. Id. at subd. 11.

Records relating to unsubstantiated reports are destroyed unless the subject requests otherwise; substantiated records are destroyed seven months after the final entry in the case, and cases that are neither substantiated nor unsubstantiated may be maintained for up to one year. Id. at subd. 11.

Although all persons who make reports whether voluntarily or mandatorily are immune from liability if they have acted in good faith and exercised due care, id. at subd. 4, a tort remedy is created under the statute for any false reports made willfully or recklessly. Id. at subd. 5.

Although section 626.557 does not explicitly provide for a means of appeal, its two references to Chapter 13 of the Minnesota statutes regulating government data practices provide access to a

detailed process of administrative review. In section 13.04 (entitled "Rights of Subjects of Data"), anyone who is the subject of governmentally maintained data may contest the accuracy or completeness of the data. The subject is required to notify the responsible authority[5] in writing, "describing the nature of the disagreement," within thirty days. Inaccurate or incomplete data shall be corrected or the responsible authority shall notify the subject that "he believes the data to be correct". Most important, the statute provides that "[t]he determinations of the responsible authority may be appealed

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5 "Responsible authority" is defined, for political subdivisions, as "the individual designated by the governing body of that political subdivision as the individual responsible for the collection, use, and dissemination of any set of data[.]" Minn. Stat. Ann. §13.02, subd. 16.

pursuant to the provisions of the administrative procedure act relating to contested cases." Minn. Stat. Ann. §13.04 subd. 4.

Although Chapter 13 does not give a cross-reference citation to Minnesota's Administrative Procedure Act (APA), it refers to the APA by name, and that statute is set forth immediately thereafter in Chapter 14. Under section 14.57, state agencies are required to initiate contested case proceedings when they are "required by law." This has been determined to require such a proceeding where a hearing is required by statute or by constitutional provision. See Commers v. Spartz, 294 N.W.2d 321, 322 (Minn. 1980) (county required to invoke APA over alleged violation of Minnesota Criminal Rehabilitation Act); MPIRG v. Minnesota Environmental Quality

Council, 237 N.W.2d 375, 381-82 (Minn. 1975); G. Beck, Administrative Contested Case Practices in Minnesota, 37 Bench and Bar, 39 (1980). For contested cases, all parties are given an opportunity for a hearing after reasonable notice which state the time and place, and issues involved in the case. Minn. Stat. Ann. §14.58.

The state APA also provides for the creation of an office of administrative hearings, Minn. Stat. Ann. §14.48, and vests in the chief administrative law judge the authority to "adopt rules to govern the procedural conduct of all hearings." Minn. Stat. Ann. §14.51. although at the time of this proceeding these agency rules were not codified in the same manner they are now, they are publicly available and disseminated in 2 MCAR §§ 1.201-220 and 9 MCAR §§2.201-299,

Conteseted Case procedures, recodified as 1 Minnesota Rules, §§ 1205.0100-.2000 and 1400.0100-.8500 (1983).

The rules governing administrative appeals provide the time limitation for appealing (a "reasonable time" or 180 days after the responsible authority has made its decision), the address of the Commissioner of Administration to whom such appeals should be directed, and the required contents of the appeal notice. 1 Minn. Rules, §1205.1600. The case is then referred to a hearing examiner who presides at a hearing pursuant to rules for contested case hearings, 1 Minn. Rules §1400.5700-.8500. These rules provide for notice to all parties, section 1400.5600; right to counsel, section 1400.5800; discovery, section 1400.6700; evidentiary rules (which allows the admission of "all evidence

which possess probative value"), section 1400.7300; and preparation of a record, section 1400.7400; among other things. Finally, after an aggrieved party has exhausted his means of administrative review under state administrative rules, he is entitled to submit his case for judicial review of the contested case decision. Minn. Stat. Ann. §14.63-.70.

Our thorough review of these statutes and regulations persuades us that the procedures for fact-finding and review satisfy the three-pronged test in Mathews. The first factor, the private interest affected by the official action, suggests that the procedures are adequate. Although as we have observed, Mr. and Mrs. Bohn's interest in their family's solidarity and reputation as they relate to the family's vitality is a protectible interest, it is counter-

balanced by the children's interest in continued freedom from abuse or neglect. Statutes like this one must attempt to harmonize this polarity of competing interests, and we believe this statute mediates between the two by minimizing the state's interference in family life. Essentially, the state makes a finding (which is treated confidentially), offers supportive social services, and monitors the progress of the family. Under this statute taken alone, the finding is not published, the child is not ordinarily taken from the parents, and the parents are not ordinarily prosecuted. Thus, the statute is designed as a preventative measure to minimize the damage which vulnerable children might suffer from familial conflict. Because the statute effectively mediates between the private interests, we cannot say it is constitu-

tionally defective on the first Mathews factor.

The second Mathews factor for evaluating the constitutional adequacy of these procedures is the risk of error and the potential value of additional procedural protections. Although Minn. Stat. Ann. §626.556 does not incorporate an adversary hearing with cross-examination and representation by counsel, we do not believe such procedures are constitutional prerequisites under the circumstances. As we have noted above, the County's investigation is intended to be thorough and complex, drawing on the resources of health-related professionals and a variety of county law enforcement and social service personnel.

Moreover, the ex post procedures for review are fully adequate to test the veracity of the County Department's

finding in that these procedures substantially incorporate truth-testing measure long approved by our legal system. We note that ex post procedures have previously been approved by the courts in cases which bear comparison with the case at bar. Thus, the Second Circuit recently declared, "Where a pre-deprivation hearing is impractical and a post-deprivation hearing is meaningful, the State satisfies its constitutional obligation by providing the latter." Gigio v. Dunn, 732 F.2d 1133, 1135 (2nd Cir. 1984), cert. denied, 105 S.Ct. 328 (1985). In cases which require fast action to protect the interests of children, e.g., Duchesne v. Sugarman, 566 F.2d 817, 826 (2d Cir. 1977), or where an ex ante intervention by the state was based on a generally reliable ex ante finding, see Barry v.

Barchi, 443 U.S. 55, 64-65 (1979), such procedures have been upheld. Moreover, reasoning by negative example, ex post procedures are generally disapproved where the state's only post-termination process lies in an independent tort action. Logan v. Zimmerman Brush Co. 455 U.S. 422, 437-37 (1982). In this case, the statute's tort remedy is amply supplemented by the full procedural protections embodied in the state APA and supporting rules. In addition, we believe that the interjection of fuller procedural protections at an earlier state in the process would be unduly time-consuming and cumbersome, and might well reduce important protections which the state legislation designed for otherwise vulnerable children.

Third, we consider the government's interests, including the burdens imposed

by additional procedural protections. The government has a strong interest in protecting powerless children who have not attained their age of majority but may be subject to abuse or neglect. To the extent that pre-investigation procedural protections might delay or frustrate the protection of these children, we believe the government's interest might be impaired. In addition, although the pecuniary cost of such additional protection might not be great, to the extent that it would be duplicative of ex post procedures we have discussed at length, whatever cost would be entailed would be wasteful.

Thus, based on our review of the relevant statutes and their underlying administrative rules, we conclude that the Bohns' interests were adequately protected by the available procedures.

Our discussion has, in part, touched on the available means of administrative review which we have approved, yet we have not resolved the additional due process question raised by the Bohns: despite the adequacy of the review procedure, did state officials deny the Bohns due process by misrepresenting to their attorney that administrative review was unavailable?

III. DUE PROCESS AND OFFICIAL MISREPRESENTATION ABOUT THE AVAILABILITY OF PROCEDURAL REVIEW

Initially, we set forth a chronology of the events which the Bohns allege constituted misrepresentations about the availability of their appeal rights. The familial conflict which gave rise to this litigation occurred on May 31, 1982, with a prompt investigation and a finding of child abuse a few days later. The Bohns argue that a supervisory social worker in

the County Department advised them orally, on June 4, 1982, that the finding of child abuse was final and unappealable. Three days later, the Bohns' attorney made three phone calls to an attorney assigned to the County Department of Social Services, and none of the calls was returned. On June 11, the Bohns' attorney requested an opportunity to present evidence that would contradict the finding, but the County Department advised them that the investigation was complete. The County Department made no reference to proper procedure for appealing the determination.

The Bohns then commenced an action in Dakota County Juvenile Court on July 9, 1982, in an apparent attempt to demonstrate that the Bohn children were not abused or neglected. Although the juvenile court subsequently declined

jurisdiction, at this hearing the assistant County attorney suggested that the Bohns appeal under the "Fair Hearing Act." Accordingly, the Bohns' attorney spoke with an official of the State Department of Public Welfare, who said that he did not believe that a finding of child abuse was appealable, but suggested that the Bohns send a letter to inquire further. As we discuss below, in this letter, the Bohns' attorney requested an appeal "pursuant to Minnesota Statutes 256.045 [6] or any other statute." He asked "that services now being provided by the

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6 Minn. Stat. Ann. §256.045 provides for state agency hearings for applicants for public assistance whose application "is denied, not acted upon with reasonable promptness, or whose assistance is suspended, reduced, terminated, or claimed to have been incorrectly paid." On its face, the statute does not apply to the Bohns' situation, as noted by the state official who responded to the Bohns' attorney.

Dakota County Department of Human Services be terminated or, in the alternative, that the Department be directed to proceed in Dakota County Juvenile Court." The state appeals referee responded that the statute "contains no language which provides authority to conduct a hearing for the purpose of reviewing the appropriateness of services provided in response to the identification of child abuse. * * * [T]he issue you present is not appealable under MSA 356.045."

After the juvenile court action was dismissed in September, 1982, and unsuccessfully appealed to the Dakota County district court, the Bohns appealed the matter to the Minnesota Supreme Court in January, 1983. The Bohns concede in their brief before this Court that, on that appeal, six months after the

incident at issue, "the attorney representing the Dakota County Department of Human Services referred to Minnesota statutes concerning the review of private data maintained by a department as providing the means of appealing a finding of child abuse. This was the first information provided by defendants concerning a means of appeal. There was no mention of any administrative procedures." (Appellant's Brief at 12). In light of this information, the Bohns dismissed their appeal to the State Supreme Court (after a prehearing conference in which one of the justices suggested a civil rights suit as possible remedy) and sought disclosure of the documents maintained by Dakota County authorities under the Minnesota Data Practices Act. The Bohns' attorney requested that several documents be

changed to state the Mr. Bohn had not abused his children; the director of the County Department replied that the documents were accurate and would not be changed unless the requested change was more specific. The County Department made no reference to the availability of any further review procedures.

The Bohns concurrently pursued several political remedies, including requests for assistance from their elected County Commissioner, the Dakota County Human Services Board and their state representative. Because these efforts were unavailing, the Bohns commenced the present section 1983 action.

The Bohns contend that this drawn-out quest for relief through administrative review violates their due process rights. Although this Court has not previously

addressed this issue, we find guidance in decisions of other courts in analogous cases discussing official misrepresentation regarding appeal rights. Thus, when the Community Service Administration abolished many positions as part of a reduction-in-force due to shrinking appropriations, it was held to violate due process when the agency failed to notify an employee that voluntary retirement extinguished his right to appeal: "The agency's additional failure to inform him that a retirement election would preclude a later appeal denied him the right to consider this fact in making his decision." Covington v. Department of Health and Human Services, 750 F.2d 937, 943 (Fed. Cir. 1984). That Court added, "A decision made 'with blinders on,' based on misinformation or a lack of information, cannot be binding as a

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matter of due process."

The Covington Court relied on Shubinsky v. United States, 488 F.2d 1003 (Ct. Cl. 1973), which also involved termination of a government employee. When the general notification of reduction-in-force was issued, it erroneously advised employees that the United States Civil Service Commission would not consider employee appeals. Although the employee's specific notice allowed an appeal of his termination, he did not appeal because his agency had been "liquidated." In deciding in favor of the employee, the Court held:

> Having misrepresented by written notice the factors material to plaintiff's preference-eligible rights, it became incumbent upon defendant to rectify such misrepresentation in similar written form. This defendant failed to do. Instead, defendant continued to represent to plaintiff, even after the issuance of the specific notice of RIF, that [his laboratory] had been "disestablished," rather than "reorganized" (as in

its notice of July 1, 1970 extending plaintiff temporary retention on government payroll for a period equal to his accumulated sick leave).

Id. at 1006

Similarly, in another case considering allegations of unlawful overcharges in natural gas contracts, the Temporary Emergency Court of Appeals held:

> When an agency itself has explicitly represented that reconsideration is not available after a certain type of ruling, and its regulations are not clearly to the contrary, resort to an otherwise available judicial remedy should not be precluded for failure to exhaust administrative remedies.

Air Products & Chemicals, Inc. v. United Gas Pipeline, 503 F.2d 1060 (Temp. Em. Ct. App. 1974).

On the other hand, the Seventh Circuit has held that exhaustion requirements may be imposed where complainants had notice of available review procedures and did not exercise their option:

> The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the com-

> plainant merely declines or fails to take advantage of the administrative procedure. * * * [A] state cannot be held to have violated due process requirement when it has made procedural protection available and the plaintiff has simply refused to avail himself of them [sic].

Dusanek v. Hanon, 677 F.2d 538, 542-43 (7th Cir.), cert. denied, 459 U.S. 1017 (1982)

In the circumstances, we cannot say that the state's administrative review procedures were so opaque or that state officials so misrepresented the availability of the procedures that the Bohns' attorney ought not to have been able to ascertain the proper method for obtaining review. Regarding the complexity of the procedures as set out in the statutes and administrative regulations, we agree with the Bohns' attorney that the regulations, as codified in MCAR, were difficult to locate. Nevertheless, as an attorney, he had the duty to his clients to inform

himself thoroughly regarding the law and supporting administrative regulations. We find it unpersuasive to suggest that a due-process defect lies in the absence of a cross-reference citation to the section of the state APA when Chapter 13 refers to the APA by name as the proper vehicle for administrative review. In addition, we believe that the statutory authorization for the chief hearing examiner to promulgate regulations should have put the Bohns' attorney on notice that the regulations were publicly available to assist claimants and their attorneys. In any event, the problem should have been solved no later than January, 1983, when, six months after the alleged abuse, attorneys for the County cited the specific statutory provisions under which the Bohns could seek administrative relief.

The state's erroneous misrepresentations present a slightly more difficult problem, but they, too, do not rise to the level of a due process deprivation. Simply put, the Bohns' attorney asked the wrong question and got the right answer. In his letter to the State Department of Public Welfare, the attorney asked for an appeal under section 256.045, which covers appeals for denial of benefits. Although he requested an appeal under any other statute as well, he sought a termination of benefits, not a review of the data underlying the finding of child abuse; and although the state official might have drawn the right conclusion, we cannot say, from that request, that it was a denial of due process if he failed to do so.

After January, 1983, when the Bohns' attorney belatedly learned of the data

practices statute, he should have been on notice of the relevant appeal procedures. Although the County Department made no reference to available appeal procedures, the statute under which the Bohns had sought correction includes the provision, "The determination of the responsible authority may be appealed pursuant to the provisions of the administrative procedure act relating to contested cases." Minn. Stat. Ann. §13.04, subd. 4. Relying on his professional instincts and training, the Bohns' attorney ought reasonably to have consulted this section. After seeing reference to the promulgation of rules, Minn. Stat. Ann. §14.51, he ought reasonably to have sought out the applicable volume of MCAR or to have contacted the appropriate state officials, which he finally did in February, 1984, to learn about the state

regulations governing appeal of contested cases.

We do not comment on the alleged oral misdirections by state or county officials because they are not a part of this record. The other instances of miscommunication between the Bohns' attorney and state or county officials resemble the two exchanges of correspondence we have just discussed: either the Bohns' attorney asked the wrong question or did not pursue the full implications of the information he obtained. Under the circumstances, then, we cannot say that these misdirections contributed to a due process violation.

We add, however, that this holding is confined by the facts of this case. As in some of the termination cases we have cited, more serious misdirection by state officials which nullifies a complainant's

right to appeal might well contribute to a due process violation. Had the Bohns not had an attorney who was trained to read and interpret complex statutes, we well might have reached a different result. See United States v. Boyle, 53 U.S.L.W. 4059, 4062 (January 9, 1985).[7] Perhaps most important, if the Bohns were permanently foreclosed from offering at a hearing the evidence they claim exonerates them, we might reach a different result. But the attorney for the County,

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> When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code would nullify the very purpose of seeking the advice of a presumed expert in the first place.
>
> United States v. Boyle, 53 U.S.L.W. at 4062.

in his brief before this Court, has represented that, during the pendency of their section 1983 action, the Bohns "were advised that [administrative review] procedures were still available. These procedures remain available to appellants even today[.]" From this, we conclude that the County is willing to participate in the panoply of procedures we have set forth in this opinion and to allow the Bohns a full hearing to present the evidence they say will set the record straight.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Wayne Louis and Sharon Anne Bohn	)	No. 4-83-733 Civil
Plaintiff	)	
-vs-	)	Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) of F.R. Criminal Procedure
County of Dakota; Shirley L. Utzinger et al	)	
Defendant	)	

You are hereby notified that in the above-entitled cause, on the 9th day of October, 1985 we filed Certified Copy of Opinion from the Court of Appeals, Eighth Circuit that the Judgment of the district court is affirmed.

Certified copy of Judgment from the Court of Appeals, Eighth Circuit that Upon reconsideration of the premises it hereby adjudged and decreed that the judgment of the district court is affirmed in accordance with the opinion

of this Court. September 11, 1985.

By: Deputy Clerk

Dale C. Nathan
3435 Washington Drive, Suite 201
Eagan, MN 55122

Meagher, Geer, Markham, jAnderson [sic],
Adamson, Flaskamp & Brennan
W.D. Flaskamp
2250 IDS Center
Minneapolis, MN 55402

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

WAYNE LOUIS BOHN and SHARON ANNE BOHN, Individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a Minor, and Wayne Arthur Bohn, Plaintiffs, v. COUNTY OF DAKOTA; SHIRLEY L. UTZINGER, Director of Social Services, Dakota County Human Services Department; BETH WELSONS, Worker, Child Protection Assessment Unit; ANTHONY A. BIBUS, Supervisor, Child Protection Assessment Unit; KENNETH E. MALVEY, Assistant County Attorney; ROBERT F. CAROLAN, County Attorney; DAKOTA COUNTY HUMAN SERVICES BOARD; JOHN S. VOSS, Chairman, JOSEPH A. HARRIS, GERALD E. HOLLENKAMP, STEVEN LOEDING and RUSSELL L. STREEFLAND, Defendants.	MEMORANDUM OPINION AND ORDER Civil No. 4-83-733

DALE C. NATHAN, Esq., Eagan, Minnesota, appeared on behalf of plaintiffs.

DOUGLAS J. MUIRHEAD, Esq., Meaher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan, Minneaplis, Minnesota, appeared on behalf of defendants.

Plaintiffs commenced this action pursuant to 42 U.S.C. §§1983, 1985, and 1986. The complaint alleges a deprivation of the plaintiffs' procedural due process rights. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 1333. Now before the court is defendants' motion to dismiss plaintiffs' amended complaint for failure to state a claim upon which relief may be granted. In the alternative, defendants seek dismissal of certain defendants and to have various portions of the complaint stricken. Plaintiffs have filed a motion to permit

them to amend their amended complaint, to commence discovery, and for attorney's fees and costs.[1]

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[1] Plaintiffs seek to amend their complaint to add the following paragraphs:

> 11(a). At all times material herein, defendants Shirley L. Utzinger, Beth Welshons, Anthony A. Bibus, Kenneth E. Malvey, Robet F. Carolan, John S. Voss, Joseph S. Harris, Gerald E. Hollenkamp, Steven Loeding, and Russell L. Streefland were duly appointed, qualified and acting in their respective official capacities and employment, and each of them was acting under power of the statutes, ordinances, regulations, customers [sic] and usages of the State of Minnesota, the County of Dakota.
>
> 11(b). Defendant County of Dakota, a municipal corporation under the laws of the State of Minnesota, at all times material herein, was the employer of the individually named defendants and each of them. Said County of Dakota, at and for all times material herein, provided the individually named defendants, and each of them, with official duties and titles and it was in the name or and/or under the power of authority of the County of Dakota that the individually named defendants, and each of them, performed the acts and omissions alleged herein.

These paragraphs do not alter the basis

Background

Plaintiffs Wayne L. Bohn and Sharon are the natural parents of plaintiffs Wayne A. Bohn, age 18, and Bradley Bohn, age 13. Wayne L. and Sharon Bohn bring this suit individully as as natural guardians and guardians ad litem for their two sons.

Defendant Dakota County is a municipal corporation located in Minnesota. Dakota County exercises general corporate powers, including the provision and maintenance of social services through the Dakota County Department of Human Services. Defendants Shirley L. Utzinger, Beth Welshons, and Anthony Bibus are all employees of the Department of Human Services, Defendant Kenneth E. Malvey is

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of plaintiffs' claim and, in light of the court's resolution of this matter, further amendment of the complaint would serve no useful purpose.

an Assistant County Attorney of Dakota County and at all times relevant to the complaint was assigned to the Department of Human Services. Defendant Robert F. Carolan is the County Attorney of Dakota County. Defendants John Voss, Joseph Harris, Gerald Hollenkamp, Steven Loeding, and Russell L. Streefland are members of the Dakota County Human Services Board.

On May 31, 1982, while Wayne L. was doing some construction work on the family house, a fight developed between Wayne A. and his brother Bradley. When Wayle L. became aware of the fight he intervened and used force to restrain Wayne A.

Wayne A. immediately ran to the home of a nearby neighbor, and the Eagan Police Department was subsequently notified of the incident. After conducting an

investigation, the Eagan police reported the matter to the Assessment Unit of the Department of Human Services.

After conducting her own investigation, defendant Beth Welsons, who was assigned to the Assessment Unit, concluded there was "substantiated evidence" of an incident of child abuse. A Child Protection Worker was subsequently assigned to the Bohn family who met privately with Wayne A. and Bradley. In addition, the Department of Human Services interviewed teachers and friends of Wayne A., as well as neighbors and associates of the Bohn family.

On June 4, 1982, a licensed physician examined Wayne A. and found no evidence of physical abuse. A copy of the physicians' report was furnished to defendants on June 7, 1982. On June 15, 1982, Wayne A. sent a letter to defendant

Dakota County Department of Human Services stating that the allegations of child abuse were in error and demanded that any futher [sic] proceedings based on these allegations be discontinued.

In telephone conversations and a letter dated June 16, 1982, defendant Anthony A. Bibus allegedly advised plaintiffs' attorney that the finding of child abuse and the determination of the need for a child protection worker was final and not subject to review. Consequently, plaintiffs' counsel initiated an action in Dakota County Juvenile Court in an attempt to obtain judicial review of the defendants' actions. The case was dismissed for lack of a justiciable controversy. Plaintiffs' counsel also appealed to the Minnesota Department of Public Welfare, but the agency declined review on the basis that it lacked

jurisdiction to review matters relating to child abuse. Plaintiffs then brought the matter to the attention of a Dakota County Commissioner and the Dakota County Human Services Board. Both advised the plaintiffs that because the matter was in litigation they were unable to intervene.

By letter dated April 29, 1983, sent to Shirly [sic] Utzinger at the Dakota County Human Services Department, plaintiffs' counsel requested, pursuant to Minn. Stat. § 15.165, that the records of the department be corrected to state that plaintiff Wayne L. did not abuse his son Wayne A. Utzinger replied in a letter dated May 27, 1983, indicating that the records had been reexamined and found to be accurate.

Based on these factual allegations, plaintiffs allege that their due procees rights have been violated. The complaint

alleges that Minn. Stat. § 626.556, which provides for the reporting of suspected child abuse, fails

> to provide procedures by which a person determined to have abused his child is given notice of how the finding can be contested,...learning the names of the relevant witnesses, cross-examining witnesses, presenting testimony and evidence in his defense, gaining full and free access to the evidence against him or disproving the evidence on which the finding is based.

Plaintiffs allege that as a result of defendants' investigtion [sic] and findings of child abuse they have suffered irreparable harm to their family relationships and reputation. In addition, plaintiffs allege that defendants' actions have led to the constructive termination of their right to be foster parents.

In a section labeled "an additonal [sic] cause of action", the complaint alleges that defendants' actions

were taken as part of a conspiracy

against plaintiffs and others in that the defendants were engaged in a campaign against child abuse...and zealously sought out plaintiffs as candidates for findings of child abuse...for the purpose of justifying more staff and funds, or for political self-enhancement, all in willful disregard of the plaintiffs' rights, privileges and immunities secured by the United States Constitution and the Constitution and laws of the State of Minnesota...

The complaint also alleges that

the defendants, by failing to make reasonable inquiries, or to reasonable [sic] evaluate ad consider information obtained by them or provided by them, were grossly negligent in the investigation conducted to determine if plaintiff Wayne Louis Bohn had abused his son, or plaintiff Wayne Arthur Bohn was an abused child.[2]

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[2] Plaintiffs' "additional cause of action" is apparently an attempt to state a claim under 42 U.S.C. §§1985 and 1986. Section 1985 does not provide a cause of action for violations of due process however. Dunn v. Gazzola, 216 F.2d 709 (1st Cir. 1954); Oaks v. City of Fairhope, 515 F.Supp. 547 (D. Tex. 1981). And § 1986 may not be invoked unless a claim exists under § 1985. See e.g., Williams v. St. Joseph Hospital, 629 F.2d 448 (7th Cir. 1980); Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975); Tumulty v. City of Minneapolis, 511 F.Supp. 36 (D. Minn.

Discussion

Plaintiffs argue that their rights associated with the parent-child relationship and being a foster parent have been impaired as the result of defendants' actions pursuant to Minn. Stat. § 626.556. This statute provides for the reporting and investigation of suspected child abuse. Plaintiffs contend that they have been denied the opportunity to challenge defendants' finding that Wayne L. Bohn abused his son. A careful reading of the relevant statutes and supporting administrative rules indicates, however, that the legislative scheme provides due process.

The reporting of child abuse is governed by Minn. Stat. § 626.556. The statute requires certain persons, such as

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1980). Plaintiffs' additional cause of action therefore fails to state a claim upon which relief may be granted.

doctors, social workers, etc., to report information concerning child abuse to the local welfare agency, police department, or county sheriff. Minn. Stat. § 626.556, subd. 3. Other persons may report such information voluntarily, Id. The local welfare agency is required immediately to investigate such reports and offer social services for purposes of preventing further abuses. Id. at subd. 10.

In performing these duties, the local welfare agency is required to maintain records, which are considered "private data" as defined in Minn. Stat. § 13. Id. Private data is not available to the public, but may be obtained by the individual who is the subject of the data. Minn. Stat. § 13.02, subd. 12. While the name of the reporter is kept confidential, the reporter's name may be

obtained after the investigation is complete upon court order. Minn. Stat. § 626.556, subd. 11.

Under the Minnesota statute governing data practices, an individual who is the subject of government data may contest its accuracy or completeness. Minn. Stat. § 13.04, subd.4. To exercise this right the individual simply notifies the responsible authority and describes the nature of the disagreement. Id. The authority has 30 days to either correct the data found to be inaccurate and attempt to notify past recipients or notify the individual that the authority believes the data to be correct. Id.

By letter dated April 29, 1983, plaintiffs' counsel initiated this procedure by notifying defendant Dakota County Human Services Department of their claim that records maintained in regard

to the Bohn family were inaccurate. The Human Services Department responded by letter dated May 27, 1983, and, in conformance with the statute, informed plaintiffs' counsel that the records had been reviewed and determined to be accurate. Upon receiving the Department of Human Service's [sic] response, plaintiffs' counsel apparently concluded further review was unavailable and thus commenced this suit.

Plaintiffs' counsel's conclusion that no further review was possible, however, was erroneous. Minn. Stat. § 13.04, subd. 4 specifically provides that if an individual us unsatisfied with the determination of the responsible authority concerning the accuracy of the data, he or she may appeal the determination pursuant to the provisions of the Administrative Procedure Act relating to

"contested cases." This provision is implemented through regulations promulgated by the Commissioner of Adminsitration and set forth in the Minnesota Code of Agency Rules (MCAR) as sections 2 MCAR §§ 1.201 to 1.220. Rule 2 MCAR 1 1.215 provides that appeals from decisions of responsible authorites may be mnde to the Commissioner of Administration who in turn will refer the case to the Office of Administrative Hearings for a contested case hearing pursuant to the Administrative Procedure Act, Minn. Stat. Ch. 14.

The procedure for contested cases is set forth at Minn. Stat. §§ 14.57 to 14.62 and at 9 MCAR §§ 2.201 et. seq.. A hearing examiner is appointed, and a hearing is held after reasonable notice to all parties. Id. at § 14.50, § 14.58. The statute provides for de novo review, and any evidence that possesses probative

value may be admitted. Id. at § 1.460, subd. 1. Each party has the right to cross-examine witnesses and to submit rebuttal evidence. Id. at subd. 4. Upon his own initiative or upon written request of any interested party, the chief hearing examiner may issue a subpoena for the attendance of a witness or the production of books, papers, records or other documents as are material to the matter being heard. Id. at § 14.51. The subpoenas are enforceable through the district court in the district in which the subpoena is issued. Id.

These statutory and regulatory provisions indicate that plaintiffs are provided with a procedure to challenge defendants' finding of child abuse and that the procedure comports with constitutional requirements of due process.

The statutes and regulations provide the right to a hearing, to discovery, to present evidence or witneses [sic], and to cross-examine adverse witnesses. If plaintiffs wish to obtain the names of the individuals reporting the allegations of child abuse, they may seek a subpoena from the chief hearing examiner, which is enforceable through the district court, or submit an application directly to the district court. See Minn. Stat. § 14.51. Given these provisions, plaintiffs have failed to state a claim for a violation of their right to due process. See Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651 (1977); Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982).

Because of this determination it is not necessary to discuss other issues raised by the parties, and since plaintiffs'

federal claims should be dismissed, jurisdiction is lacking over any pendent claims.

O R D E R

Accordingly, based on all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss plaintiffs' complaint, for failure to state a claim upon which relief can be granted, is granted.

2. Plaintiffs' motion to amend their amended complaint, to commence discovery, and for attorney's fees and costs is denied.

Dated: May 1, 1984.

/s/ Diana E. Murphy
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Wayne Louis Bohn, etc.	) No. 4-83 Civil 733
Plaintiff(s)	)
vs.	) Clerk's Notice under Rule 77(d) F.R. Civil Procedure or Rule 49(c) F.R. Criminal Produre
County of Dakota, et al	)
Defendant(s)	)

You are hereby notified that in the above-entitled cause, on the 1st day of May, 1984, we filed Judge Murphy's Memorandum Opinion and Order that defendants' motion to dismiss plaintiffs' complaint, for failure to state a claim upon which relief can be granted, is granted. Plaintiffs' motion to amend their amended complaint, to commence discovery, and for attorney's fees and costs is denied. Judgment was entered accordingly.

ROBERT E. HESS, CLERK

By: Deputy Clerk

Dale C. Nathan
3435 Washington Drive, Suite 201
Eagan, MN 55122

W.D. Flaskamp
Meagher, Geer, et al
2250 IDS Center
Minneapolis, MN 55402

85-1001 (3)

Supreme Court, U.S.
FILED
DEC 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
1985 Term

Wayne Louis Bohn and Sharon Anne Bohn, individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a minor and Wayne Arthur Bohn,

Plaintiffs-Petitioners,

vs.

County of Dakota; Shirley L. Utzinger, Director of Social Services, Dakota County Human Services Department; Beth Welshons, Worker, Child Protection Assessment Unit; Anthony A. Bibus, Supervisor, Child Protection Assessment Unit; Kenneth Malvey, Assistant County Attorney; Robert F. Carolan, County Attorney; Dakota County Human Services Board; John S. Voss, Chairman, Joseph A. Harris, Gerald E. Hollenkamp, Steven Loeding, and Russell L. Streefland,

Defendants-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX -- PART II

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626.556 REPORTING OF MALTREATMENT OF MINORS

Subdivision 1. Public Policy. The legislature hereby declares that the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse; to strengthen the family and make the home safe for children through improvement of parental and guardian capacity for responsible child care; and to provide a safe temporary or permanent home environment for physically or sexually abused children.

In addition, it is the policy of this state to require the reporting of suspected neglect, physical or sexual abuse of children; to provide for the voluntary reporting of abuse or neglect of children; to require the investigation

of such reports; and to provide protective and counseling services in appropriate cases.

Subd. 2. Definitions. As used in this section, the following terms have the meanings given them unless the specific content indicates otherwise:

(a) "Sexual abuse" means the subjection by the child's parents, guardian or person responsible for the child's care, to any act which constitutes a violation of sections 609.342, 609.343, 609.344 or 609.345, or sections 609.364 to 609.3644. Sexual abuse also includes any act which involves a minor which constitutes a violation of sections 609.321 to 609.324 or 617.246.

(b) "Neglect" means failure by a parent, guardian or other person responsible for a child's care to supply a child with necessary food, clothing,

shelter or medical care when reasonably able to do so or failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so. Nothing in this section shall be construed to mean that a child is neglected solely because the child's parent, guardian or other person responsible for his care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child.

(c) "Physical abuse" means"

(i) Any physical injury inflicted by a parent, guardian or other person responsible for the child's care on a child other than by accidental means; or

(ii) Any physical injury that cannot reasonably be explained by the history of injuries provided by a parent, guardian

or other person responsible for the child's care.

(d) "Report" means any report received by the local welfare agency, police department or county sheriff pursuant to this section.

(e) "Facility" means a day care facility or a residential facility as defined in section 245.782.

(f) "Operator" means an operator or agency as defined in section 245.7822.

Subd. 3. Persons mandated to report. A professional or his delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement who has knowledge of or reasonable cause to believe a child is being neglected or physically or sexually abused shall immediately report the

information to the local welfare agency, police department or the county sheriff. The police department or the county sheriff, upon receiving a report, shall immediately notify the local welfare agency. The local welfare agency, upon receiving a report, shall immediately notify the local police department or the county sheriff. Nothing in this subdivision shall be construed to require more than one report from any institution, facility, school or agency.

Any person not required to report under the provisions of this subdivision may voluntarily report to the local welfare agency, police department or the county sheriff if he has knowledge of or reasonable cause to believe a child is being neglected or subjected to physical or sexual abuse. The police department or the county sheriff, upon receiving a

report, shall immediately notify the local welfare agency.

Any person who makes a report shall, upon request to the local welfare agency, receive a concise summary of the disposition of the report, unless release would be detrimental to the best interests of the child.

Subd. 4. Immunity from liability. Any person, including those voluntarily making reports and those required to make reports under subdivision 3, participating in good faith and exercising due care in the making of a report pursuant to this section shall have immunity from any liability, civil or criminal, that otherwise might result by reason of his action.

Subd. 5. Falsified reports. Any person who willfully or recklessly makes a false report under the provisions of

this section shall be liable in a civil suit for any actual damages suffered by the person or persons so reported and for any punitive damages set by the court or jury.

Subd. 6. Failure to report. Any person required by ths section to report suspected physical or sexual child abuse or neglect who willfully fails to do so shall be guilty of a misdemeanor.

Subd. 7. Report. An oral report shall be made immediately by telephone or otherwise. An oral report made by a person required under subdivision 3 to report shall be followed as soon as possible by a report in writing to the appropriate police department, the county sheriff or local welfare agency. Any report shall be of sufficient content to identify the child, the parent, guardian, or other person responsible for his care,

the nature and extent of the child's injuries and the name and address of the reporter. Written reports received by a police department or the county sheriff shall be forwarded immediately to the local welfare agency. The police department or the county sheriff may keep copies of reports received by them. Copies of written reports received by a local welfare department shall be forwarded immediately to the local police department or the county sheriff.

A written copy of a report maintained by personnel of agencies other than welfare or law enforcement agencies, which are subject to chapter 13 shall be confidential. An individual subject of the report may obtain access to the original report as provided by subdivision 11.

Subd. 8. Evidence not privileged. No

evidence regarding the child's injuries shall be excluded in any proceeding arising out of the alleged neglect or physical or sexual abuse on the grounds of either a physician-patient or husband-wife privilege.

Subd. 9. Mandatory reporting to a medical examiner or coroner. When a person required to report under the provisions of subdivison 3 has reasonable cause to believe a child has died as a result of neglect or physical or sexual abuse, he shall report that information to the appropriate medical examiner or coroner instead of the local welfare agency, police department or county sheriff. Medical examiners or coroners shall notify the local welfare agency, police department or county sheriff. Medical examiners or coroners shall notify the local welfare agency or police

department or county sheriff in instances in which they believe that the child has died as a result of neglect or physical or sexual abuse. The medical examiner or coroner shall complete an investigation as soon as feasible and report the findings to the policy department or county sheriff and the local welfare agency.

Subd. 10. Duties of local welfare agency upon receipt of a report. The local welfare agency shall immediately investigate and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible. When necessary the local welfare agency shall seek authority to remove the child from the custody of his parent, guardian or adult with whom

he is living. In performing any of these duties, the local welfare agency shall maintain appropriate records.

Subd. 11. Records. All records maintained by a local welfare agency under this section, including any written reports filed under subdivision 7, shall be private data on individuals, except insofar as copies of reports are required by subdivision 7 to be sent to the local police department or the county sheriff. Report records maintained by any police department or the county sheriff shall be private data on individuals except the reports shall be made available to the investigating, petitioning, or prosecuting authority. The welfare board shall make available to the investigating, petitioning, or prosecuting authority any records which contain information relating to a specific incident of

neglect or abuse which is under investigation, petition, or prosecution and information relating to any prior incidents of neglect or abuse involving any of the same persons. The records shall be collected and maintained in accordance with the provisions of chapter 13. An individual subject of a record shall have access to the record in accordance with those sections, except that the name of the reporter shall be confidential while the report is under investigation. After the investigation is completed, the name of the reporter shall be confidential but shall be accessible to the individual subject of the record uon court order.

Records maintained by local welfare agencies, the police department or county sheriff under this section shall be destroyed as described in clauses (a) to

(c):

(a) If upon investigation a report is found to be unsubstantiated, notice of intent to destroy records of the report shall be mailed to the individual subject of the report. At the subject's request the records shall be maintained as private data. If no request from the subject is received within 30 days of mailing the notice of intent to destroy, the records shall be destroyed.

(b) All records relating to reports which, upon investigation, are found to be substantiated shall be destroyed seven years after the date of the final entry in the case record.

(c) All records of reports which, upon initial investigation, cannot be substantiated or disproved to the satisfaction of the local welfare agency, local police department or county sheriff may

be kept for a period of one year. If the local welfare agency, local police department or county sheriff is unable to substantiate the report within that period, each agency unable to substantiate the report shall destroy its records relating to the report in he manner provided by clause (a).

Subd. 12. Duties of facility operators. Any operator, or volunteer worker at any facility who intentionally neglects, physically abuses, or sexually abuses any child in the care of that facility may be charged with a violation of section 609.23. Any operator of a facility who knowingly permits conditions to exist which result in neglect, physical abuse, or sexual abuse or a child in the care of that facility may be charged with a violation of section 609.23.

Subd. 13. Application of data practices act. The classification of reports and records created or maintained for the purposes of this section shall be determined as provided by this section, notwithstanding any other classifications established by chapter 13.

13.04 RIGHTS OF SUBJECTS OF DATA

Subdivision 1. Type of data. The rights of individuals on whom the data is stored or to be stored shall be as set forth in this section.

Subd. 2. Information required to be given individual. An individual asked to supply private or confidential data concerning himself shall be informed of: (a) the purpose and intended use of the requested data within the collecting state agency, political subdivision or statewide system; (b) whether he may

refuse or is legally required to supply the requested data; (c) any known consequence arising from his supplying or refusing to supply private or confidential data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data; and (d) the identity of other persons or entities authorized by state or federal law to receive the data. This requirement shall not apply when an individual is asked to supply investigative data to a law enforcement officer.

Subd. 3. Access to data by individual. Upon request to a responsible authority, an individual shall be informed whether he is the subject of stored data on individuals, and whether it is classified as public, private or confidential. Upon his further request, an individual who is the subject of stored private or public

data on individuals shall be shown the data without any charge to him and, if he desires, shall be informed of the content and meaning of that data. After an individual has been shown the private data and informed of its meaning, the data need not be disclosed to him for six months thereafter unless a dispute or action pursuant to his section is pending or additional data on the individual has been collected or created. The responsible authority shall provide copies of the private or public data upon request by the individual subject of the data. The responsible authority may require the requesting person to pay the actual costs of making, certifying, and compiling the copies.

The responsible authority shall comply immediately, if possible, with any request made pursuant to this subdivi-

sion, or within five days of the date of the request, excluding Saturdays, Sundays and legal holidays, if immediate compliance is not possible. If he cannot comply with the request within that time, he shall so inform the individual, and may have an additional five days within which to comply with the request, excluding Saturdays, Sundays and legal holidays.

MINNESOTA STATUTES §§14.57 to 14.61

14.57. INITIATION; DECISION

An agency shall initiate a contested case proceeding when one is required by law. Unless otherwise provided by law, an agency shall decide a contested case only in accordance with the contested case procdures of the administrative procedure act.

14.58. NOTICE AND HEARING

In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place and issues involved, but if, by reason of the nature of the case, the issues cannot by fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be affored all parties to present evidence and argument with respect thereto. Prior to assignment of a case to a hearing examiner as provided by sections 14.48 to 14.56, all papers shall be filed with the agency. Subsequent to assignment of the case, the agency shall certify the official record to the office of administrative hearings, and thereafter, all papers shall be filed with

that office. The office of administrative hearings shall maintain the official record which shall include subsesquent filing, testimony and exhibits. All filings are deemed effective upon receipt. The record shall contain a written transcript of the hearing only if preparation of a transcript is requested by the agency, a party, or the chief hearing examiner. The agency or party requesting a transcript shall bear the costs of preparation. When the chief hearing examiner requests preparation of the transcript, the agency shall bear the cost of preparation. Upon issuance of the hearing examiner's report, the official record shall be certified to the agency.

14.59 INFORMAL DISPOSITION

Informal disposition may also be made of any contested case by stipulation,

agreed settlement, consent order or default.

14.60 EVIDENCE IN CONTESTED CASE HEARINGS

Subdivision 1. Admissibility. In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and repetitious evidence.

Subdivision 2. Made part of record. All evidence, including records and documents containing information classified by law as not public, in the possession of the agency of which it desires to avail itself or which is offered into evidence by a party to a contested case proceeding, shall be made

a part of the hearing record of the case. No factual information or evidence shall be considered in the determination of the case unless it is part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. When the hearing record contains information which is not public, the hearing examiner or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

Subd. 3. Cross-examination of witnesses. Every party or agency shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

Subd. 4. Official notice. Agencies may take notice of judicially cognizable facts and in addition may take notice of

general, technical, or scientific facts within their specialized knowledge. Parties shall be notified in writing either before or during hearing, or by reference in preliminary reports or otherwise, or by oral statement in the record, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record.

14.61 AGENCY DECISION IN CONTESTED CASE

In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the hearing examiner as required by sections 14.48 to 14.56 has been made available to parties to the proceeding for at least ten days

and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision.

14.62 DECISIONS, ORDERS

Subdivision 1. Writing required. Every decision and order rendered by an agency in a contested case shall be in writing, shall be based on the record and shall include the agency's findings of fact and conclusions on all material issues. A copy of the decision and order shall be served upon each party or his representative and the hearing examiner by first class mail.

Subd. 2. Failure to make decision. Unless otherwise provided by law, if an agency fails to render a decision and order in a contested case within 90 days after the submission of the final hearing

examiner report and subsequenty exceptions and arguments under section 14.61, if any, any party may petition the court of appeals for an order requiring the agency to render a decision and order on the contested case within such time as the court determines to be appropriate. The order shall be issued unless the agency shows that further delay is reasonable.

MINNESOTA STATUTES §§14.63 to 14.70

14.63. APPLICATION

Any person aggrieved by a final decision in a contested case is entitled to judicial review of the decision under the provisions of section 14.63 to 14.68, but nothing in sections 14.63 to 14.68 shall be deemed to prevent resort to other means of review, redress, relief, or trial do novo provided by law now or

hereafter enacted. A petition by an aggrieved person for judicial review under sections 14.63 to 14.68 must be filed with the district court and served on the agency not more than 30 days after the party receives the final decision and order of the agency.

14.64. PETITION;SERVICE

Proceedings for review under sections 14.63 to 14.68 shall be instituted by serving a petition personally or by certified mail upon the agency and by filing the petition in the office of the clerk of district court for the county where the agency has its principal office or the county of residence of the petitioners.

In case a request for rehearing or reconsideration shall have been made within ten days after the decision and order of the agency, the 30-day period

provided in section 14.63 shall not begin to run until service of the order finally disposing of the application for rehearing or reconsideration, but nothing herein shall be construed as requiring that an application for rehearing or reconsideration be filed with and disposed of by the agency as a prerequisite to the institution of a review proceeding under sections 14.63 to 14.68.

The petition shall state the nature of the petitioner's interest, the facts showing the petitioner is aggrieved and is affected by the decision, and the ground or grounds upon which the petitioner contends that the decision should be reversed or modified. The petition may be amended by leave of court although the time for serving the petition has expired. The petition shall be entitled in the name of the person serving the

petition as petitioner and the name of the agency whose decision is sought to be reviewed as respondent. Copies of the petition shall be served, personally or by certified mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made; and for the purpose of such service the agency upon request shall certify to the petitioner the names and addresses of all such parties as disclosed by its records, which certification shall be conclusive. The agency and all parties to the proceeding before it shall have the right to participate in the proceedings for review. The court in its discretion may permit other interested parties to intervene.

Every person served with the petition

for review as provided in section 14.63 to 14.68 and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner. within 20 days after service of the petition upon such person, a notice of appearance stating his position with reference to the affirmance, vacation, reversal or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general and shall be filed, together with proof of service thereof, with the clerk of the reviewing court within ten days after such service. Service of all subsequent papers or notices in such proceedings need be made only upon the petitioner, the named respondent, the attorney general, and such other persons as have served and

filed the notice as hereir provided, or have been permitted to intervene in said proceedings as parties thereto by order of the reviewing court.

14.65 STAY OF DECISION; STAY OF OTHER APPEALS

The filing of the petition shall not stay the enforcement of the agency decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper. When an appeal from a final decision is commenced under section 14.63 to 14.68 in any district court of this state, any other later appeal under sections 14.63 to 14.68 from such final decision involving the same subject matter shall be stayed until final decision of the first appeal.

14.66. TRANSMITTAL OF RECORD

Within 30 days after service of the petition, or within such further time as

the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

14.67. NEW EVIDENCE, HEARING BY AGENCY

If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to

present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decison.

14.68. PROCEDURE ON REVIEW

The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs. Except as otherwise provided all

proceedings shall be conducted according to the rules of civil procedure.

14.69. SCOPE OF JUDICIAL REVIEW

In a judicial review under section 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial right of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

(a) In violation of constitutional provisions; or

(b) In excess of the statutory authority or jurisdiction of the agency; or

(c) Made upon unlawful procedure; or

(d) Affected by other error of law; or

(e) Unsupported by substantial evidence in view of the entire record as submitted; or

(f) Arbitrary or capricious.

14.70. APPEALS TO SUPREME COURT

An aggrieved party, including an agency which issued a decision and order in the case, may secure a review of any final order or judgment of the district court under sections 14.63 to 14.68 by appeal to the supreme court. The appeal shall be taken in the manner provided by law for appeals from orders of judgments of the district court in other civil cases.

2 MCAR §1.215

Pursuant to Minnesota Statutes, section 15.165, subdivision 4 of the act, an individual may appeal an adverse determination of a responsible authority to the commissioner of administration.

A. The appeal shall follow the procedures established in Minnesota Statutes, chapter 15, as amended, and the rules of the Office of Administrative

Hearings relating to contested case proceedings.

B. Notice of an appeal must be submitted to the commissioner within a reasonable time of the determination made by the responsible authority pursuant to Minnesota Statutes, section 15.165, subdivision 4 of the act. For purposes of this section, "reasonable time" shall mean 180 days unless the responsible authority has provided the individual with a written statement which informs the individual of the right to appeal the determination to the commissioner. In the event this statement is provided, "reasonable time" for purposes of this section shall mean 60 days.

1. The notice shall be in writing and addressed to the Commissioner of Administration, State of Minnesota, 50 Sherburne Avenue, St. Paul, Minnesota

55155.

2. The notice shall contain the following information:

a. The name, address, and phone number, if any, of the appealing party.

b. The name of the responsible authority and the entity which he or she represents.

c. A description of the nature of the dispute, including a description of the data.

d. A description of the desired result of the appeal.

9 MCAR §2.217, Subp. 5

Subp. 5. Burden of proof. The party proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.

Supreme Court, U.S.
FILED
JAN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1001

IN THE SUPREME COURT OF THE UNITED STATES
1985 Term

Wayne Louis Bohn and Sharon Anne Bohn, individually and as Natural Guardians and Guardians Ad Litem, Bradley L. Bohn, a minor and Wayne Arthur Bohn,

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Defendants-Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

There is no dispute that on May 31, 1982, Wayne Louis Bohn used force to subdue his son, Wayne Arthur Bohn. He did so by gripping the metal head of a hammer in his hand and swinging it backhand so that the wooden handle struck Wayne Arthur Bohn on the skull, causing him to fall to the ground. It is quite true that Wayne Arthur Bohn became very upset by this treatment and, after picking himself up off the ground, ran away to a neighbor's house. Thereafter the police were contacted, the police reported the matter to the Dakota County Department of Human Services, and an investigation was then conducted to determine whether there was sufficient evidence to substantiate an allegation of physical abuse of the child. All of these actions were taken pursuant to Minnesota Stat. §626.556.

When the allegation of physical abuse was substantiated, the Bohns were contacted and an offer of counseling services was made. When this offer was rejected, there was no further intrusion into the family unit of Petitioners initiated by any of the Defendants.

Within one week of the accident, Petitioners had retained their present counsel who wrote to Defendants and

specifically instructed them to have no further contact with his clients. Thereafter, Attorney Nathan initiated a broad range of unusual, and sometimes bizarre, procedures on behalf of his clients. For instance, Attorney Nathan prepared and executed a sworn affidavit alleging that his client, Wayne Louis Bohn, had physically abused his client, Wayne Arthur Bohn, to such an extent that the child had to be considered "neglected" within the meaning of Minnesota Statutes. Attorney Nathan filed this document with the Dakota County Family Court and then demanded that Dakota County proceed with the prosecution of these claims, so that Attorney Nathan could defend them. Dakota County declined to do so. The case was dismissed by the Family Court. This dismissal was affirmed on appeal to the Dakota County District Court and ultimately the Minnesota Supreme Court.

Petitioners initiated this action in United States District Court in August of 1983. Respondents timely moved the Minnesota District Court to dismiss the Complaint under F.R.C.P. Rule 12 for failure to state a claim upon which relief can be granted. Hearing on this motion occurred November 9, 1983, before the Honorable Diana E. Murphy. Judge Murphy acknowledged that the Complaint did not state a cause of action, but

declined to dismiss the Complaint at that time. Rather, it was ordered that an Amended Complaint be served with all causes of action clearly stated.

The Amended Complaint was served, and Respondents made a second motion to dismiss for failure to state a claim pursuant to F.R.C.P. Rule 12. In response to that motion, Petitioners sought leave to amend their Complaint yet a second time, and submitted specific allegations proposed to be included in the new Complaint. By Order dated May 1, 1984, Judge Murphy dismissed Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. Judge Murphy's memorandum decision specifically referred to Petitioner's request for leave to amend a second time, and explained why the proposed amendment would not have changed her decision in any event.

Petitioners then appealed to the United States Circuit Court for the Eighth Circuit. Since the appeal was from a motion to dismiss upon the pleadings, the Eighth Circuit accepted all of the Petitioners' factual allegations as true in considering the appeal.

The Eighth Circuit conducted a detailed analysis of the pleadings and the record before the Trial Court. The Eighth

Circuit properly denied the Appellants' efforts to submit factual information never provided to the Trial Court to, in effect, try the case de novo at the Appellate level.[1] The Eighth Circuit Court of Appeals concluded that the Plaintiffs' allegations did not rise to the level of substantive due process violations, since the state statutes in question provided a proper balance between the privacy interests of the family unit and the state interest in protecting vulnerable children from abuse. The Eighth Circuit concluded that Appellants had failed to state an adequate procedural due process claim because the statutory procedures of the State of Minnesota provided for all necessary due process under the circumstances. Finally, the Eighth Circuit concluded that under the specific facts of this case, where Petitioners have been represented by counsel of their own choosing who has placed the matter on an adversarial basis virtually from the outset, and where Respondents remain willing, even now, to afford Petitioners with the due process

[1]Those efforts continue on this Petition. Factual allegations are made throughout the Petition which were never part of the record below. Thus, at page 13 of the Petition, reference is made to administrative proceedings relative to Petitioners which are not part of the record before the Trial or Appellate Courts. At page 38 Petitioners "mention" a newspaper article on appeal. Other examples exist which are far too numerous to recite here.

rights afforded by the statutes of the State of Minnesota, any misdirection or misstatement by Respondents as to the procedures available to Petitioners would not rise to a violation of due process.

ARGUMENT

Petitioners have failed to identify any of the considerations set forth in Rule 17 of the Rules of the Supreme Court of the United States as justifying their Petition for Certiorari. Certainly they have not identified any decision of another Federal Court of Appeals on the same matter which conflicts with the holding in this case. Petitioners have identified numerous cases talking about the circumstances under which due process requires a private citizen be given notice of appeal procedures which are available. Not one of those cases, however, deals with a situation in which the private citizen has, at all relevant times, been represented by licensed, and presumably competent, counsel of his or her own choosing. It is that crucial distinction which the Eighth Circuit Court of Appeals focused on for its decision under the unique facts of this case.

Furthermore, to the extent that Petitioners challenge the adequacy or intelligibility of the rules and regulations which provide procedures for appeals in this circumstance, the Eighth Circuit has specifically noted that those rules and regulations have been re-codified since the time of Petitioners' claims, and are publicly available and disseminated. (A-18).

Even assuming, without conceding, that these regulations were more difficult to interpret in their older form, that problem has now been addressed and corrected in the re-codification. The Eighth Circuit Court of Appeals was clearly satisfied with the form of those regulations as they presently exist.

CONCLUSION

The Petition for Writ of Certiorari in this case far exceeds the thirty page limitation contained at Rule 21.4 of the Rules of the Supreme Court of the United States. Furthermore, Petitioners have so failed to present their arguments with "accuracy, brevity and clearness" as to render it virtually impossible for Respondents to address their arguments with specificity. Rather than further burden the Court with a ninety page document analyzing all of the claims and arguments in the Petition, Respondents have attempted to identify the substantial arguments and show briefly why certiorari should be granted.

DATED: January 9, 1986.

Respectfully submitted,

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